

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
3
4 In Re:) Docket No. 3:17-BK-3283 (LTS)
5)
6) PROMESA Title III
7 The Financial Oversight and)
8 Management Board for)
9 Puerto Rico,) (Jointly Administered)
10)
11 *as representative of*)
12)
13 The Commonwealth of)
14 Puerto Rico and the)
15 Puerto Rico Electric)
16 Power Authority,) June 4, 2020
17)
18 Debtors,)
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13 In Re:) Docket No. 3:17-BK-3567 (LTS)
14)
15) PROMESA Title III
16 The Financial Oversight and)
17 Management Board for)
18 Puerto Rico,) (Jointly Administered)
19)
20 *as representative of*)
21)
22 The Puerto Rico Highways)
23 and Transportation)
24 Authority,)
25 Debtor.)

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OMNIBUS HEARING

BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN

UNITED STATES DISTRICT COURT JUDGE

AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

ALL PARTIES APPEARING TELEPHONICALLY

For The Commonwealth
of Puerto Rico, et al.: Mr. Martin J. Bienenstock, PHV

For the Official
Committee of Unsecured
Creditors: Mr. Luc A. Despins, PHV
Mr. Zachary S. Zwillinger, PHV

For Ambac Assurance
Corporation: Ms. Atara Miller, PHV

For Assured Guaranty
Corporation and
Assured Guaranty
Municipal Corporation: Mr. Mark C. Ellenberg, PHV

For Puerto Rico Fiscal
Agency and Financial
Advisory Authority: Ms. Elizabeth L. McKeen, PHV

For Bacardi
International Limited
and Bacardi
Corporation: Ms. Dianne Coffino, PHV

1 APPEARANCES, Continued:

2 For AmeriNational
3 Community Services,
4 LLC, and
5 Cantor-Katz Collateral
6 Monitor, LLC:

Mr. Douglas S. Mintz, PHV
Mr. Nayuan Zouairabani Trinidad, PHV

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San Juan, Puerto Rico

June 4, 2020

At or about 9:37 AM

* * *

THE COURT: All right. Then we will begin. I'd ask Ms. Tacoronte to call the case.

MS. TACORONTE: Good morning, Your Honor.

Bankruptcy case 17-3283, *In Re: The Financial Oversight and Management Board for Puerto Rico*, as representative of the Commonwealth of Puerto Rico. The Honorable Judge Laura Taylor Swain presiding. Also sitting, Honorable Magistrate Judge Judith Gail Dein.

THE COURT: Thank you.

Buenos dias. This is Judge Swain speaking. Welcome back counsel, parties in interest, and members of the public and the press. Today's telephonic hearing is a continuation of the Omnibus Hearing that began yesterday. For clarity, and for those who are joining us for the first time today, I will repeat my usual instructions regarding the hearing.

To ensure the orderly operation of today's telephonic hearing, all parties on the line must mute their phones when they are not speaking. If you are not accessing these proceedings on a computer, please be sure to select mute on both the Court Solutions dashboard and your telephone.

I remind everyone that, consistent with Court and

1 Judicial Conference policies and the Orders that have been
2 issued, no recording or retransmission of the hearing is
3 permitted by any person, including but not limited to the
4 parties, members of the public, and the press. Violations of
5 this rule may be punished with sanctions.

6 I will be calling on each speaker during these
7 proceedings. When you speak, please start by identifying
8 yourself by name for clarity of the record. Please do not
9 interrupt each other or me during this hearing. If we
10 interrupt each other, it is difficult to create an accurate
11 transcript of the proceedings. Having said that, I apologize
12 in advance for breaking this rule, as I may interrupt if I
13 have questions or if you go beyond your allotted time.
14 However, if anyone has any difficulty hearing me or another
15 participant, please say something immediately.

16 The time allotments for each matter and the time
17 allotments for each speaker are set forth in Section III of
18 the Agenda that was filed by the Oversight Board on Monday,
19 June 1st. That Agenda was filed at docket entry 13305 in case
20 17-3283 and is available to the public at no cost on Prime
21 Clerk for those interested.

22 I encourage each speaker to keep track of his or her
23 own time. The Court will also be keeping track of the time
24 and will alert each speaker when there are two minutes
25 remaining with one buzz, and when time is up, with two buzzes.

1 And here is an example of the buzz sound.

2 (Sound played.)

3 THE COURT: If your allocation is two minutes or
4 less, you will just hear the final buzzes.

5 When we need to take a break, I will direct everyone
6 to disconnect and then dial back in at a specified time. Our
7 timing for this morning is from 9:30 to 12:45. We will take a
8 ten minute break around 11:15, and then we will resume in the
9 afternoon at 2:15 and go until 5:00, if necessary. The longer
10 mid-day break is necessitated by a conflict in the Court's
11 schedule, and so I am thankful for your patience and your
12 understanding.

13 Today we are having the preliminary hearing on three
14 motions for relief from stay relating to revenue bonds: The
15 monoline insurers' Lift Stay Motion with respect to HTA bonds,
16 which is docket entry 10102 in case 17-3283; the monolines'
17 Lift Stay Motion with respect to PRIFA bonds, which is docket
18 entry 10602 in case 17-3283; and the monolines' Lift Stay
19 Motion with respect to CCDA bonds, which is docket entry
20 number 10104 in case 17-3283.

21 We will begin with the argument relating to HTA
22 bonds. I have 40 minutes allocated to Ms. Miller and/or
23 Mr. Ellenberg. So which of you will be speaking first?

24 MR. ELLENBERG: Your Honor, this is Mark Ellenberg.
25 I was going to start, but, as I understood your Court's

1 subsequent Order, all of the arguments were going to be made
2 on behalf of movants, and then all of the arguments are going
3 to be made on behalf of opponents. And then we were going to
4 end with a rebuttal.

5 THE COURT: Yes.

6 MR. ELLENBERG: And so we've -- we view that as a
7 90-minute block, which we would allocate as follows: I would
8 start with 30 minutes devoted to the lien and standing
9 issues -- well, the lien issues as they relate to HTA, and the
10 standing issues in general. Ms. Miller would then spend 45
11 minutes addressing preemption across all three motions and the
12 lien issues relating to PRIFA and CCDA. And then we would
13 reserve 15 minutes for rebuttal that we will share.

14 THE COURT: Very well then.

15 MR. ELLENBERG: So then I would start with 30
16 minutes, Your Honor.

17 THE COURT: Yes. Understood. All right then. Thank
18 you very much for those clarifications, and we will adjust our
19 timing mechanisms accordingly.

20 So, Mr. Ellenberg.

21 MR. ELLENBERG: Thank you, Your Honor. And if the
22 Court please, Mark Ellenberg, counsel to Assured and speaking
23 on behalf of all movants with respect to the lien issues in
24 HTA and standing.

25 Your Honor, the excise tax statutes transfer

1 ownership of the pledged taxes to HTA for the benefit of the
2 bondholders. The statutes were enacted or amended
3 contemporaneously with each of the 1968 and 1998 bond issues,
4 and they were enacted for the express purpose of funding the
5 bonds.

6 The legislature's intent is clear: It was to enable
7 the construction of highways for the Commonwealth for the use
8 of the residents of the island through the pledge of tolls and
9 excise taxes, without exposing the general credit of the
10 Commonwealth. The pledge was the essence of the transaction.
11 The language in the statutes themselves makes that quite
12 clear.

13 And I'd ask, Your Honor, if you have handy the
14 demonstrative package that we submitted to you?

15 THE COURT: I do. That is Docket Entry 13339.

16 MR. ELLENBERG: Yes, Your Honor.

17 And so pages four, five, and six of the demonstrative
18 package have a chart which sets forth salient provisions of
19 the tax statutes. And I will focus on the oil and gasoline
20 tax in the far left-hand column, but -- the other statutes are
21 not identical but to the same effect.

22 So if we start with 3175 --

23 THE COURT: That would be D-4?

24 MR. ELLENBERG: Yes, D-4, Your Honor.

25 THE COURT: D --

1 MR. ELLENBERG: D, as in dog.

2 THE COURT: Four?

3 MR. ELLENBERG: Yes. Excise tax statutes.

4 THE COURT: Yes.

5 MR. ELLENBERG: There should be a chart, Your
6 Honor.

7 THE COURT: Yes. I have it here. It's page 14 of
8 the PDF, the consolidated PDF.

9 MR. ELLENBERG: Okay. I'm --

10 THE COURT: There are many ways, but it's page D-4.
11 It's headed, Excise Tax Statutes Provide that Revenues are
12 Held --

13 MR. ELLENBERG: Yes. Exactly.

14 THE COURT: So I'm there.

15 MR. ELLENBERG: Okay. So let's start with subsection
16 (A), which creates a four cent tax, which is to be covered
17 into a special deposit in favor of the Highways and
18 Transportation Authority for its corporate purposes, although
19 we will see later that "for its corporate purposes" is then
20 qualified by later positions. (A)(1)(a) tells us that the
21 secretary shall transfer every month the amounts covered into
22 the special deposit.

23 So we now know that a tax was enacted specifically to
24 fund the repayment of these bonds, and that it was to be kept
25 separate from the General Fund, which is the assets of the

1 Commonwealth, for the benefit of the Highways and
2 Transportation Authority. And that it was to be transferred
3 to them on a regular basis.

4 If we then turn to the next page, Your Honor, D-5, we
5 see that the Highways and Transportation Authority is given
6 the authority to commit or pledge the proceeds of the
7 collections on the taxes. And then down at the bottom it
8 says, unless clawback applies, the proceeds of said
9 collection, in the amount that they be necessary, shall be
10 used solely, shall be used solely for the payment of the
11 principal and interest on bonds and other obligations of the
12 Authority. So that while -- and so that while these taxes
13 were given to HTA for its general purposes, in the event that
14 they issue bonds, then the bondholders will have a first lien
15 on these assets.

16 And how this works, Your Honor, is that there's a
17 waterfall in the bond resolutions. And --

18 THE COURT: I know that -- pardon me. I just have a
19 question before you go on. And I know that you will be
20 talking about liens, but your position is that word -- shall
21 be used solely is not merely a statutory direction, but is
22 actually the imposition of a lien that would give somebody the
23 power to enforce it as against these specific assets, even
24 though the word "lien" isn't used here, even though the word
25 "pledge" isn't used here?

1 MR. ELLENBERG: Yes, Your Honor. We believe it means
2 two things: First, we believe that the statute as a whole,
3 and that provision is certainly a key part of it, actually
4 transfers the beneficial ownership of the excise taxes to HTA,
5 and that HTA has then pledged them on through a consensual
6 lien to the bondholders.

7 But in addition to that, we believe that that
8 language is also sufficient to create a charge against the
9 property, and that that charge satisfies the requirements for
10 a statutory lien, which applies against the taxes in anyone's
11 hands, including the Commonwealth.

12 THE COURT: Thank you.

13 MR. ELLENBERG: Okay. So Your Honor, I apologize for
14 that phone ringing in the background.

15 Your Honor, if we then turn to page D-6, we see now
16 that the government of Puerto Rico itself is making agreements
17 and commitments. And it makes two of them, each one of which
18 is very important.

19 So first, it agrees and commits -- agreement wasn't
20 enough. It had to also commit not to reduce the tax that was
21 just enacted to fund the bonds. And then it says that it will
22 ensure that the taxes are covered into the special deposit in
23 the name and for the benefit of HTA. In the name and for the
24 benefit of HTA, until such bonds, issued at any time,
25 including their interest, have been paid in full.

1 So, Your Honor, this language, which is critical,
2 establishes a number of things. First, as I said, taken as a
3 whole, the statute establishes that HTA is the beneficial
4 owner of the designated excise taxes, which makes perfect
5 sense, because the taxes were what was going to repay the
6 bondholders. In fact, the bondholders only have recourse to
7 the collateral that is pledged to them. They don't have
8 recourse against the general credit of the Commonwealth. They
9 don't even have recourse against the general credit of HTA.
10 Their sole recourse is to the pledge. That was the essence of
11 the deal. And so HTA, as the party issuing the bonds, became
12 the beneficial owner.

13 Second, the statute establishes that HTA had the
14 authority to issue bonds and to pledge the taxes.

15 Third, there's the requirement that the taxes be kept
16 separate from the General Fund, not commingled with the
17 Commonwealth assets.

18 Fourth, there's a requirement that they be
19 transmitted by the Treasury to HTA on a regular basis. And
20 then we have the two direct commitments by the Commonwealth
21 itself.

22 Now, Your Honor, these are not mere contractual
23 covenants. They're not just unsecured promises. This is the
24 law of Puerto Rico. It was enacted by the legislature, and it
25 was signed into law by the Governor.

1 This is the law. They have to obey it. It is not a
2 mere contract. Anyone can breach a contract, whether or not
3 they're a debtor, but you can't breach a law. For example,
4 the Government of Puerto Rico is subject to procurement laws
5 and regulations. Can they breach those just because they're a
6 debtor?

7 You heard yesterday, with respect to PREPA, that PREB
8 approval was necessary with respect to the contracts they
9 wanted to assume. They're a debtor. Can they just ignore
10 PREB? No, of course they can't. This is the law of Puerto
11 Rico. It cannot just be ignored. And their status as a
12 debtor gives them no greater right to ignore it than they had
13 before. They have to follow the law.

14 And again, Your Honor, we have to step back and look
15 at the entire question of what was the legislature trying to
16 accomplish here? They are trying to accomplish the funding of
17 highways for the Commonwealth without impacting their general
18 credit. And the way to do that was to create streams of
19 revenues that would secure the bonds and limit the
20 bondholders' recourse to those revenues. That's the deal. We
21 accept that deal. We don't want more than we were entitled
22 to. But what we do want is the collateral that was clearly
23 pledged to us.

24 Now, Your Honor, this language directly refutes a
25 number of the arguments made by the government parties. And

1 let me try to go through them.

2 The first argument is that because the Commonwealth
3 is not liable for the bonds, the excise taxes cannot be taken
4 to pay for the bonds. Well, what this legislation shows is
5 that the Commonwealth clearly understood that the excise taxes
6 would be used to pay for the bonds. Indeed, the Commonwealth
7 expressly commits by law that it will not diminish the taxes
8 until the bonds are paid in full.

9 This means that either, one, the excise taxes are not
10 the property of the Commonwealth, which is we believe the
11 right answer; or two, at a minimum, that the Commonwealth
12 agreed to guarantee the bonds to the extent of the pledged
13 excise taxes. One of those two things must be true. Either
14 way, the bondholders are secured by the taxes.

15 Now, the next argument, Your Honor, is that the
16 statutes merely make the excise taxes available to HTA for its
17 general corporate purposes. But as we noted, that statement
18 was qualified by subsequent clauses. The first authorizes HTA
19 to issue debts secured by the excise taxes, and the second is
20 that once that debt is issued, the bondholders shall have a
21 first lien on the excise taxes.

22 Now, what happens, Your Honor, is that the taxes
23 are -- and the tolls are poured into the waterfall set up in
24 the bond resolutions. And the first priority is to top up the
25 various reserve funds created by those resolutions, and it is

1 out of those funds that principal and interest on the bonds
2 are paid. But once all those funds are topped up, whatever
3 falls out at the bottom of the waterfall is available to HTA
4 for its general corporate purposes. Historically, Your Honor,
5 about 400 million dollars a year has fallen through the bottom
6 of the waterfall and been available to HTA for its use,
7 including maintenance of the toll roads.

8 Now, Your Honor, we're seeking relief from the stay
9 to enforce our rights under the bond resolutions. So that is
10 our right. Our right is to have the excise taxes and the
11 tolls poured into the waterfall to have our funds, our reserve
12 funds topped up. And then when there's money left over, yes,
13 HTA can have it.

14 We're not here to say that we are seizing the funds.
15 We're not going to take all of them. All we want is to have
16 the bond resolutions enforced. That's the deal we signed up
17 for. We're happy to live with it.

18 The next argument, Your Honor, is that the grant of
19 the taxes to HTA is merely conditional, and that's based on
20 the clawback. But that's wrong. The language obligating the
21 taxes to a special deposit for the benefit of HTA is in no way
22 conditional. It's mandatory. There's a "shall".

23 Similarly, the transfer obligation isn't mandatory --
24 there's a "shall" there, and there's no qualification in any
25 way whatsoever. The qualification doesn't appear until we get

1 down to -- until we get down to Section (A)(1)(c). And the
2 qualification appears there only in reference to the priority
3 lien given to the bondholders.

4 So effectively, the constitutional clawback is a
5 carve-out from our lien. It is not a carve out from the
6 transfer of ownership to HTA. And in that sense, Your Honor,
7 it's just like the carve-out of a DIP loan. DIP lenders get
8 liens on the assets of the debtor, but they allow a carve-out
9 for attorneys' fees. It's standard operating procedure.

10 That doesn't mean they don't have a lien. It just
11 means the lien is subject to a carve-out. Well, it's exactly
12 the same here. Our lien is subject --

13 THE COURT: Okay.

14 MR. ELLENBERG -- to a carve-out -- I'm sorry, Your
15 Honor. You were going to speak?

16 THE COURT: Yes. And so you're saying that Article
17 VI, Section Eight does not affect, qualify, or limit in any
18 way, what you believe the statute does, and that it is only a
19 limitation on the consensual lien that is created by the
20 resolutions?

21 MR. ELLENBERG: Well, it's a carve-out from both the
22 consensual lien and the statutory lien. I mean, we agree that
23 our liens are subject to clawback, be they consensual or
24 statutory. And it is part of the statute. But what we're
25 saying is that it does not undercut our lien. It simply is a

1 | carve-out from our lien. It's a limitation on our lien. And
2 | it's a very conditional one.

3 | The conditionality is not in our lien or in the
4 | transfer to HTA, the transfer of ownership to HTA. The
5 | conditionality is on the clawback. And there's zero evidence
6 | in the record that the conditions for clawback have ever been
7 | met, much less that they will be met in the future. And the
8 | only permitted use of clawback funds is to pay the GO bonds.
9 | They are not generally available to the Commonwealth for
10 | whatever use it wants to make of them.

11 | In sum, Your Honor, you know, as we learned in our
12 | first year property courses, ownership is a bundle of sticks.
13 | It's not an all or nothing proposition. And so in this case,
14 | the Commonwealth has retained one stick, a very slender,
15 | conditional stick, which is clawback. But all the other
16 | sticks have been transferred to HTA, which has pledged them to
17 | the bondholders.

18 | So the next argument, Your Honor, is that the
19 | Commonwealth has no privity with the bondholders, thus
20 | depriving the bondholders of recourse to the funds, and also
21 | depriving us of standing. Well, I don't know how they can say
22 | that. The statute itself has the Commonwealth making direct
23 | agreements with and commitments to the bondholders. And there
24 | are two of them. And we just looked at them. So that not
25 | only blows up their standing argument, but it severely

1 | undercuts the whole theme of their opposition, which is that
2 | the Commonwealth is something of an innocent bystander here,
3 | who maybe made some unsecured promises but is not otherwise
4 | involved in this transaction.

5 | The Commonwealth is at the heart of this transaction.
6 | They were the architect of it, and they absolutely understood
7 | that they were alienating the tax proceeds to fund these
8 | bonds.

9 | So that leads us to the next argument, Your Honor,
10 | which is that the taxing power belongs to the Commonwealth and
11 | cannot be alienated. Well, Your Honor, the taxing power is
12 | not being alienated. It is the taxes collected pursuant to
13 | that taxing power that are being alienated. That happens all
14 | the time, and indeed, it happened in COFINA, in the COFINA
15 | Plan that you confirmed, and which was supported by the FOMB
16 | and the Commonwealth.

17 | Certain of the sales and use taxes are alienated to
18 | the COFINA structure, permanently and forever. So that can
19 | happen, and it's not an alien -- an improper alienation of the
20 | taxing authority.

21 | THE COURT: Mr. Ellen --

22 | MR. ELLENBERG: So indeed, Your Honor --

23 | THE COURT: Mr. Ellenberg?

24 | MR. ELLENBERG: Yes.

25 | THE COURT: In the statutory provisions in COFINA,

1 | there was very explicit, express language of transfer, and
2 | also language addressing the available resources clawback
3 | issue. And no language of transfer at that level of
4 | specificity is in the Excise Tax Statute, is it?

5 | MR. ELLENBERG: Yes, Your Honor. Well, the language
6 | is what we have. And what I'd say, Your Honor, is that the
7 | fact that over the course of 50 years, someone figured out how
8 | to make a better mousetrap, doesn't mean that the original
9 | mousetrap didn't catch mice.

10 | Could the language of these statutes have been even
11 | stronger? Yes. But that doesn't mean that the language here
12 | is inadequate. And again, we have to view this in the context
13 | of the entire transaction.

14 | What was the legislature intending to do? They were
15 | intending to fund the construction of highways based on the
16 | security of the tolls and the excise taxes. That's the only
17 | way the transaction worked. And so the intention to pledge
18 | them is overwhelmingly obvious. And yes, of course I agree
19 | the language could have been better.

20 | The Commonwealth and government parties also point to
21 | subsection (G) of the statute, which never became effective,
22 | but which also contained better language. But frankly, Your
23 | Honor, that later drafted provision just confirms what the
24 | intent was all along, that the -- that the clear legislative
25 | intent here was to transfer the benefit of the taxes to HTA so

1 that they could be pledged to the bondholders. And that's how
2 the bondholders were going to be repaid.

3 And again, I'd go back to the language of (A)(1)(d),
4 which says that the taxes shall be covered into a special
5 deposit in the name of and for the benefit of HTA. So I think
6 that's pretty good language, Your Honor, and I think it makes
7 the point pretty clearly.

8 So Your Honor, we not only have the plain language of
9 the statutes to rely on, but we have a First Circuit precedent
10 that's directly on point, which is the *Flores Galarza* case
11 which we discuss throughout our briefs, but initially at pages
12 20 through 24 of our Brief in Support of the Motion. And
13 *Flores Galarza* involved a statute that had the Commonwealth
14 collect insurance premiums from motorists renewing their
15 vehicle licenses in the event that they couldn't provide proof
16 that they had private insurance. And it is, in that sense,
17 very much like an excise tax.

18 And the Commonwealth was then obligated to transfer
19 the premiums to a consortium of insurers to insurer those
20 unable to get the private insurance. In 2000, however, the
21 Treasury decided that it was simply going to keep the premiums
22 to ease its own cash flow problems. Again, very reminiscent
23 of our current situation. The Court, however, concluded that
24 the insurance consortium had an entitlement to and a property
25 interest in the premiums. And by contrast, the Court

1 concluded that the Commonwealth had no property interest in
2 the premiums, but merely collected and held them as a
3 custodian, trustee or agent.

4 Now, Your Honor, the words "custodian, trustee or
5 agent" didn't appear in the statute. The word "transfer"
6 didn't appear in the statute. The word "lien" didn't appear
7 in the statute. But it was clear to the Court that the
8 government was simply acting as a collection agent. And
9 that's exactly what's going on here.

10 The government is a collection agent for the taxes,
11 much in the way that a mortgage lender is a collection agent
12 after it sells the mortgage to Freddie Mac or Fannie Mae.
13 They no longer have a beneficial ownership interest in the
14 funds. They're just collecting them on behalf of HTA and the
15 bondholders.

16 THE COURT: Now, the money in *Flores Galarza* was paid
17 by private individuals as premiums for a particular purpose
18 under a statutory scheme that said that the insurance was to
19 be provided by the entity that I think was in the plaintiff
20 position in *Flores Galarza*, or given back, and so there was --
21 it seems to me at least factually different in the sense that
22 it is not a revenue premised on something else that the
23 government is collecting and then you're asserting dedicating
24 to a particular purpose.

25 So coming in, there was no general Commonwealth

1 purpose for these premiums in *Flores Galarza*, and there was
2 another entity that was set up as being entitled to them in
3 the first place. And that's a factual distinction. Does it
4 make a legal difference from your point of view?

5 MR. ELLENBERG: Absolutely not, Your Honor. And,
6 well, what's going on here? Private individuals pay the
7 excise taxes, and they do it when they renew their automobile
8 license or when they consume certain petroleum products. And
9 those taxes, paid by private people in connection with an
10 activity, are then collected by the government, which has
11 committed to transfer them to HTA, another entity, which
12 earned them when it issued five billion dollars worth of bonds
13 secured by those revenues. And the bondholders certainly
14 earned them when they forked over five billion dollars on the
15 expectation that those pledged revenue streams would be used
16 to repay them.

17 So I think the fact that one was a payment made in
18 connection with renewing your license for insurance, and the
19 others are payments made in connection with consumption of
20 various products, you know, is a distinction absolutely
21 without a difference. And the parallels are overwhelming.

22 THE COURT: To your knowledge, are there any excise
23 taxes that are presently at HTA?

24 MR. ELLENBERG: Well, Your Honor, a hundred million
25 dollars a year is -- has been transferred since 2017 from the

1 Treasury single account to HTA. And we believe at a minimum,
2 we certainly have received those taxes.

3 THE COURT: Thank you.

4 MR. ELLENBERG: And that's exactly where I was going
5 next, Your Honor, because we not only have the taxes in *Flores*
6 *Galarza* -- we have not only the statutes in *Flores Galarza* to
7 rely on, but we have the way in which the excise taxes were
8 treated by the government historically.

9 So first and foremost, those taxes were never put
10 into the Commonwealth General Fund budget. They were never in
11 that budget. There was never an appropriation as to them.
12 They've always been kept separate from that budget and
13 appeared instead in the HTA budget, where they are labeled as
14 HTA's own funds.

15 Moreover, Your Honor, in the government's official
16 accounting system, they created a fund called Fund 278, which
17 has specific subaccounts that are dedicated to HTA. And every
18 dollar of these excise taxes is tracked into those subaccounts
19 and it's tracked out of those subaccounts. And this is
20 precisely the type of special deposit that the excise tax
21 statutes required and with -- how the Commonwealth
22 historically complied with its obligations under these
23 statutes.

24 Moreover, HTA had the authority to remove the funds
25 from the subaccount. And in Demonstrative 15, we have an

1 example of an SC-735 voucher, where HTA's signature was
2 adequate to withdraw the funds. Now, the government parties
3 make much of the fact that there's also a Treasury signature
4 on that document, but that Treasury signature is simply
5 ministerial. And so, Your Honor, if the -- if HTA didn't
6 receive the taxes ab initio when the tax statutes were enacted
7 and transferred ownership to them, they certainly received
8 them when the Commonwealth collected them as its agent. And
9 if they didn't receive them when the Commonwealth collected
10 them as an agent, then they certainly received them when they
11 were covered in two -- Fund 278.

12 And finally, as I mentioned, Your Honor, a hundred
13 million dollars a year has been transferred to HTA from the
14 Treasury single account, and certainly that should be subject
15 to our liens. And those -- those funds were received.

16 Now, Your Honor, the official statements are also
17 completely consistent with everything I've been saying.
18 Another data point in how we should read these statutes. And
19 I'm surprised that the government parties dispute this and
20 even suggest otherwise. But the official statements make
21 clear that the excise taxes are pledged to the bondholders.
22 They make clear that the Treasury is obligated to keep the
23 excise taxes separate from the general funds. They make clear
24 that the pledged taxes are subject to clawback, but only if no
25 other resources are available. And they further state that

1 clawback has never occurred in the history of the
2 Constitution.

3 On the other hand, and unlike the *ERS* case, the
4 official statements do not warn of appropriation risk, nor do
5 they warn of bankruptcy or insolvency risk. The only risk
6 factor contained in the official statements is that the excise
7 taxes and tolls themselves may not be sufficient to service
8 the bonds. That is the risk we signed up for. It is a risk
9 that has never occurred. As I said, at least four hundred
10 million a year in excise taxes and tolls are collected. But
11 that is the risk we took. We did not take the risk that the
12 government would just decide to keep the funds.

13 So, Your Honor, I think when you put all those pieces
14 of evidence together, our reading of the statute is clearly
15 corroborated. But to the extent Your Honor doesn't conclude
16 there's ownership, then there is clearly a statutory lien, as
17 I've discussed.

18 THE COURT: If you could just wind up.

19 MR. ELLENBERG: Yes, Your Honor.

20 And so finally, I would just say that we haven't
21 talked about the HTA level yet, but we did have consensual
22 liens granted to us there under the bond resolutions, that
23 clearly 601 is the operative provision, not 401. And we go
24 through that at length in our briefs.

25 And thus, at the HTA level, we have valid and

1 perfected consensual liens on both the tolls, toll receivables
2 and on the excise taxes. And that's -- Your Honor, when you
3 put the entire package together, we clearly have liens on the
4 taxes and the tolls, and that should ultimately entitle us to
5 relief from the stay to enforce those rights.

6 THE COURT: Thank you, Mr. Ellenberg.

7 And so now we'll turn to Ms. Miller. And we'll set
8 the clock at 45 minutes again. And the timekeeper, I'm sure,
9 has made a note of what little overage we had with
10 Mr. Ellenberg. And we'll circle back to that when we compute
11 what's left for with rebuttal.

12 MS. MILLER: Thank you, Your Honor. Good morning.
13 Atara Miller for Milbank on behalf of Ambac, and speaking
14 today for all of the other movants as well.

15 As Mr. Ellenberg indicated, I'm going to start by
16 speaking about preemption, but before I do, I just want to
17 respond or add to Mr. Ellenberg's response to Your Honor's
18 question about the *Flores Galarza* case and whether the idea of
19 initial ownership matters. And I just would refer the Court
20 to *In re City of Columbia Falls*. And in that case, the
21 question before the court was whether a special assessment
22 that was collected by the municipality for a specific purpose
23 was held in trust by the municipality.

24 And it was held there that it was being held in a
25 trust capacity; that the municipality acts in a pure

1 ministerial role as a custodian. And in that case, those were
2 tax assessments, special assessment taxes, which just like HTA
3 and all of the other taxes, originated in ownership with the
4 municipality there and the Commonwealth here.

5 The Oversight Board's only response to this case is
6 that ultimately, in that case, the Court held that Chapter 9
7 modified that obligation. But Chapter 9 modified the
8 obligation because the obligation to transfer this special
9 assessment was only to pay the deficiency, and if the bonds
10 were retired, there was no deficiency. So it didn't address
11 at all this fundamental question of whether or not, when a
12 statute sets up a sum like this with similar language, it
13 results in a trust for the benefit of the entities for which
14 purpose it was intended to be used.

15 So with that, I'd like to address the Oversight
16 Board's preemption arguments. And I'll note at the outset
17 that AAFAF does not join in them, which we think is
18 significant. And as this Court is aware, AAFAF actually
19 vehemently disagrees with the arguments being advanced by the
20 Oversight Board here.

21 And the Oversight Board clarified in its sur-reply
22 briefs that it's not suggesting that PROMESA preempt any
23 unsecured claim or property interest, but simply that, as
24 they explained in the CCDA sur-reply, "Territorial law cannot
25 force the Commonwealth to use retained revenues for debt

1 service."

2 Given that this preliminary hearing is limited to
3 secured status and standing, and the Oversight Board's
4 acknowledgment that its preemption argument does not impact
5 whatever security interest or -- even an unsecured claim
6 movant may have here, this issue is simply not ripe today, and
7 the Court doesn't need to reach preemption at all.

8 I'm going to, nonetheless, briefly address the
9 substance of their arguments. And the Oversight Board has
10 really articulated three separate series of preemption, and
11 Your Honor noted two at the Omnibus Hearing yesterday. The
12 first is that the Commonwealth is always free to disregard the
13 law, because one legislature can't bind another. The second,
14 that the Oversight Board's Title II budgetary powers preempt
15 bondholders' rights. And third, that the Title III
16 restructuring process preempts certain rights.

17 I'm going to address the first, which is what I call
18 the nonentrenchment, or is known as the nonentrenchment
19 principle. And the Oversight Board's argument that the
20 government statutes are mere appropriations and that the
21 Commonwealth can -- and I'm going to quote their language --
22 change its mind every minute if it chooses to do so, was
23 unequivocally rejected by the Supreme Court over 150 years
24 ago, and has consistently been reaffirmed since, as noted in
25 the Supreme Court case, *Missouri versus Jenkins* in 1990.

1 In the *Von Hoffman* case from 1886, the Supreme Court
2 expressly considered and rejected the argument that laws, and
3 in particular taxing laws, passed by one legislature cannot
4 bind a subsequent legislature. It held, and I'm going to
5 quote the language from the case, "It is clear that where a
6 statute has authorized a municipal corporation to contract and
7 to exercise the power of local taxation to the extent
8 necessary to meet its engagements, the power thus given cannot
9 be withdrawn until the contract is satisfied. The state and
10 the corporation in such cases are equally bound. The power
11 given becomes the trust which the donor cannot annul and which
12 the donee is bound to execute."

13 The structure issue in that case is exactly the same
14 as the one that we have here. These are from appropriation
15 statutes.

16 THE COURT: Ms. Miller.

17 MS. MILLER: Yes, Your Honor.

18 THE COURT: I just have a question. *Von Hoffman*
19 seems to me to reach its result via a finding of the violation
20 of the Contract Clause of the Constitution and the remedy of
21 the mandamus and specific performance. *Von Hoffman* doesn't
22 deal with the issues of reasonableness and necessity that are
23 elements of current Contract Clause jurisprudence, and so --
24 and those issues obviously weren't raised in that case.

25 Do those issues complicate or have implications for

1 the nonentrenchment principle in the current legal
2 jurisprudential structure, if you will?

3 MS. MILLER: So I would say, you know, at a
4 theoretical level, I think the answer is no. But at a
5 minimum, it would require a determination and a -- you know,
6 evidence and a finding that there were, in fact, such
7 circumstances that warranted that. And that certainly, first
8 of all, hasn't been briefed, but it is also something that
9 would have to be briefed in a substantive action, not on a
10 Lift Stay.

11 THE COURT: Yes. Thank you.

12 MS. MILLER: You're welcome.

13 And just because Your Honor raised the Contract
14 Clause issue in the -- or the Contract Clause element of the
15 holding of *Von Hoffman*, I want to also highlight the fact that
16 this is -- really becomes an issue, I think, to the extent
17 that the Oversight Board's argument is that either the budgets
18 themselves are changing the law, and so you don't even need
19 preemption, or as support for the reasonableness of Title II
20 preemption.

21 The appropriation status of these statutes doesn't
22 feed into Title III preemption. And so to the extent that
23 there's a Contracts Clause issue, we would say that the fiscal
24 plan and the budgets violate the Contracts Clause. And as
25 Your Honor has previously held now twice, to the extent that

1 we want to challenge the fiscal plan and budget on the grounds
2 that it's violating the Contracts Clause, or the Constitution,
3 such challenges would not be barred by 106(e).

4 So I'm going to turn now to discuss the Title II
5 preemption argument where the Oversight Board essentially says
6 that Title II preempted any Commonwealth law that provides for
7 the distribution of money, other than as provided for in the
8 certified fiscal plan or budget.

9 This week's Supreme Court decision in the *Aurelius*
10 case makes claim the fiscal plan and budgets themselves can't
11 preempt anything. The Oversight Board's members are merely
12 local officials. They don't exercise federal law-making
13 power, and their budgets are acts of the Commonwealth, not
14 federal law. The preemption, if it exists at all, has to be
15 based specifically on a conflict with the provisions of
16 PROMESA under Section Four.

17 The Oversight Board seems to argue that all
18 Commonwealth laws obligating the payment or transfer of money
19 were immediately preempted the moment PROMESA was enacted.
20 The plain text of PROMESA indicates that this is not what
21 Congress intended. PROMESA was enacted against the backdrop
22 of the clawback of revenues from HTA, CCDA, and PRIFA.
23 Congress included numerous provisions to roll back
24 Commonwealth laws purporting to direct the clawback of
25 revenues from those entities, including expressly preempting

1 certain Commonwealth laws and executive orders directing
2 particular use of the funds.

3 The Section 303(3), which I know we have discussed at
4 length in other cases, is a bespoke edition to the Chapter 9
5 corollary in PROMESA, and it expressly preempts unlawful
6 executive orders that diverted funds from territorial
7 instrumentalities, i.e., changed the way monies were to be
8 spent.

9 Well, every law and executive order, whether lawful
10 or not, directing the use of funds was immediately preempted
11 upon enactment of PROMESA by Section Four. This provision
12 would have been unnecessary. And if their argument is that
13 the preemption doesn't come into effect until there's a
14 conflicting budget, we would posit that that's not federal
15 preemption because the budget isn't federal.

16 But we would also say that you wouldn't have needed
17 to expressly preempt anything. You could have just given the
18 Oversight Board carte blanche to rewrite the spending as they
19 wanted to. And there's no suggestion that's in PROMESA, that
20 all spending, regardless of Commonwealth law, is at the
21 discretion of the Oversight Board.

22 Section 201(b)(1)(N) we think further supports this,
23 which requires the fiscal plan to respect the relative lawful
24 priorities, lawful liens that are in laws in effect prior to
25 the date of the enactment. So clearly, there's no intention

1 to just undermine all of the laws that the Oversight Board is
2 suggesting are simply preempted.

3 So the Oversight Board relies, of course, very
4 heavily on this argument and the First Circuit's decision in
5 *Vazquez Garced*. The decision there merely held that the
6 Governor can't override the Board's budgeting process to
7 approve future spending commitments after the enactment of
8 PROMESA. It nowhere addressed the question of whether the
9 fiscal plan could or did preempt pre-existing legal
10 obligations that were created before PROMESA.

11 And if you think about it, you know, also, *Vazquez*
12 *Garced* was really focusing on a procedural aspect, right? So
13 it was saying, does the Puerto Rico law which sets the process
14 and allows the Governor to reprogram funds that were not spent
15 in a prior fiscal year, does that process still stand or is it
16 preempted by the complex budgeting and fiscal planning process
17 that was set out in PROMESA?

18 And there it seems that there's a clear conflict with
19 the act itself, which is what Section Four preempts. It
20 doesn't preempt anything that's inconsistent with the act or
21 any actions taken hereunder.

22 Okay. So I'm going to turn now to their Title III
23 preemption argument, where the Oversight Board argues that
24 Title III of PROMESA doesn't recognize any priority other than
25 an administrative priority, and thereby preempts movants'

1 claims. So despite Mr. Bienenstock's statements yesterday,
2 this theory would apply equally to the GO bondholders. If the
3 obligation to transfer money under the revenue bond statutes
4 is a preempted priority, then the GO priority is as well.
5 There is simply no such thing as selective preemption.

6 The Oversight Board's efforts to avoid the
7 application of any rulings by this Court to the GO bonds
8 simply highlights that the Proposed Plan is nothing more than
9 the Board picking winners and losers. That issue is not
10 before the Court today, but the fact that the Board is
11 pressing this aspect of preemption and multiple fora against
12 the revenue bondholders, while at the same time desperately
13 trying to avoid adjudication of the very same legal questions
14 against the GO bondholders, is both telling and an indication
15 of the strength of this argument.

16 With respect to the revenue bondholders, this
17 argument fails on the merits. Title III addresses only the
18 treatment of claims in a Plan of Adjustment. It does not
19 abstractly preempt rights or reprioritize claims. There's no
20 plan here and, therefore, the Court need not rule on any
21 question regarding priorities in connection with this Lift
22 Stay Motion. Moreover, administrative priority relates only
23 to unsecured claims, not the secured claims asserted by
24 movants here, which PROMESA expressly recognizes and
25 preserves.

1 In any event, it would be inappropriate for this
2 Court to rule on the issue today under the First Circuit's
3 decision in *Grella* and the District of Puerto Rico's decision
4 in *In re Henderson*. The question of priority is expressly not
5 before the Court on a lift stay motion, and the Oversight
6 Board's Title III preemption argument addresses only the
7 preemption of priorities.

8 So unless Your Honor has any questions on priority,
9 I'd like to turn now to PRIFA.

10 THE COURT: You may go on to the next point. Thank
11 you.

12 MS. MILLER: Thank you.

13 So, Your Honor, there are hundreds of pages of
14 briefings, and mounds and mounds of spaghetti that have fallen
15 off the wall.

16 THE COURT: And the --

17 MS. MILLER: And if you cut through all of that, the
18 Oversight Board's -- which I'm going to try to do, and keep it
19 simple this morning. The Oversight Board's argument boils
20 down to two basic points: First, that the rum taxes belong to
21 the Commonwealth, which is free to transfer them or not at its
22 whim. And second, the bondholders have no interest in the
23 revenues until they are physically deposited into the trust
24 account. They're wrong on both points.

25 The Oversight Board's first argument requires one to

1 accept that sophisticated commercial lenders and insurers
2 extended billions of dollars of credit to PRIFA for the
3 benefit of the Commonwealth based on nothing more than a
4 promise by the Commonwealth that it would transfer money to
5 PRIFA, and an illusory one at that.

6 According to the Oversight Board, the Commonwealth,
7 at all times, retained full ownership and control over the rum
8 taxes until it chose to send them to PRIFA, and was free at
9 any time to change the law and nullify even that apparent
10 promise to transfer the money. Thankfully, the trillion
11 dollar domestic revenue bond market -- the law is not in
12 accord.

13 As we already discussed, the Supreme Court long ago
14 held that statutes authorizing an instrumentality to issue
15 bonds and pledge tax revenues to support those bonds cannot
16 simply be repealed or amended. These are not mere
17 appropriation statutes. And here, as added security, the
18 Commonwealth directly pledged to PRIFA bondholders that it
19 would not interfere with any of the rights granted to PRIFA
20 under the statute.

21 I now want to address the second argument. It's
22 clear that PRIFA's bondholder liens extend to revenues in the
23 infrastructure fund. The Oversight Board's restrictive
24 definition of our lien defies logic and is contrary to the
25 plain language of the Trust Agreement. Limiting the liens to

1 monies in the Sinking Fund means that PRIFA bondholders are
2 not secured by any PRIFA account, or any money at all until
3 PRIFA actually pays the Trustee what it owes on the bond.

4 Of course the entire point of a lien is to have
5 security in the event that the debtor does not pay. So it's
6 commonplace, it's belt and suspenders to include trust
7 accounts within the scope of the lien. But here, the Board
8 would have you believe that the bondholders only got those
9 belts and suspenders. No pants.

10 The Oversight Board nowhere explains why the trust
11 agreement 24 times references pledge or pledge to bondholders,
12 including defining the collateral as pledged revenues, when
13 the pledge didn't grant the Trustee any more rights than it
14 got under the Trust Agreement without it. According to the
15 Oversight Board, PRIFA didn't grant the Trustee a security
16 interest in any PRIFA property or account. This irrational
17 position, which the Oversight Board has contended for well
18 over a year now, resolves this motion as a matter of law, is
19 based on a plain misreading of the definition of pledged
20 revenues.

21 So, Your Honor, if you have the demonstratives that
22 we submitted in connection with the PRIFA Lift Stay, which are
23 ECF1334-1 --

24 THE COURT: Yes. Let me just turn to that. Yes.
25 Which page?

1 MS. MILLER: Page two of the deck indicated on the
2 bottom right.

3 THE COURT: If you can just give me a chance to
4 scroll up to that. If you will give me a moment.

5 So just -- we'll stop the time on the clock maybe.

6 MS. MILLER: Thank you, Your Honor.

7 THE COURT: Does it say -- okay. Slide deck. I've
8 reviewed the cover sheet and now I am --

9 MS. MILLER: It's actually the first page of the
10 document. Exactly.

11 THE COURT: Yes. The Trust Agreement grants the
12 Trustee a lien?

13 MS. MILLER: Exactly. And it incorporates the
14 relevant definition, put together in one place.

15 THE COURT: All right. I'm there. Thank you.

16 MS. MILLER: You're welcome.

17 So we tried on this flag to just put all of the
18 relevant definitions that are incorporated into the pledge, so
19 that we don't have to flip pages back and forth. So the
20 pledge is included in page nine of the Trust Agreement, and it
21 provides that PRIFA has pledged and does hereby pledge to the
22 Trustee the pledged revenues as defined herein. And the
23 Oversight Board -- and then the definition of pledged revenues
24 is, in turn, defined as, "shall mean the special tax revenues,
25 defined term, and any other monies that have been deposited to

1 the credit of the Sinking Fund."

2 The Oversight Board's entire theory rests on its
3 reading of this provision, to have deposited to the credit of
4 the Sinking Fund, qualified -- both special tax revenues and
5 any other monies that have been deposited. This has the
6 effect of making a portion of the definition entirely
7 superfluous. And this is evidenced by actually the Over --
8 the way the Oversight Board uses the term multiple times in
9 its own brief.

10 So I included a couple of examples on slide four
11 where the Oversight Board says things like, pledged revenues
12 are defined as, "Monies that have been deposited to the credit
13 of the Sinking Fund." Well, slide two has the definition, and
14 it has me saying, but what about the special tax revenues?
15 And their brief is right. If you re-deposited to the credit
16 of the Sinking Fund, you don't need special tax revenues at
17 all. In fact, you probably don't even need the defined term
18 included in the Trust Agreement at all.

19 So this reading is contrary to the well-accepted,
20 last antecedent canon principle. And the Supreme Court in
21 *Barnhart v. Thomas*, from 2003, discussed this provision, and
22 specifically in connection with a provision from the Social
23 Security Act that included the same language, "any other,"
24 right?

25 So to the extent that you would say, well, "other"

1 tells me that it has to modify back, they specifically said
2 any other. And what the Supreme Court explained in that case,
3 and kind of a memorable example of a teenage house party and
4 parents absent, which makes me, as a parent, a little bit
5 frightened, it makes the simple point which applies exactly
6 here, which is that you would expect that when you have a list
7 of two things, and the first thing is something that is quite
8 specific that everybody knows, but the second is a very broad,
9 general term, you would be qualifying the very broad, general
10 term.

11 So, for example, here pledged revenues could never
12 mean special tax revenues and any other monies. That would
13 not be the scope of the lien. You had to qualify any other
14 monies, but the first very specific provision didn't need to
15 be qualified. And so it's not -- it would be improper to read
16 the qualifying language as qualifying anything other than the
17 last provision.

18 The Oversight Board actually cited to the Circuit
19 Court decision, which was -- held to the contrary and was
20 expressly overturned on this point by the Supreme Court. So
21 not only is it precluded, it would make -- render a portion
22 meaningless and would be contrary to basic grammatical
23 principles. But under the Oversight Board's arguments that
24 they've raised, PRIFA actually couldn't even grant a lien on
25 the Sinking Fund because PRIFA doesn't own it.

1 The Sinking Fund is a trust account that's legally
2 owned by the Trustee for the benefit of the bondholders. So
3 yet another reason why it would be irrational to limit the
4 lien to something that PRIFA -- that the Oversight Board at
5 least argues PRIFA could not grant the lien in.

6 But the Oversight Board's counter to our position is
7 that the lien -- to our position that the lien extends to the
8 Infrastructure Fund is that Section 401 of the Trust Agreement
9 precludes PRIFA from granting any liens on the infrastructure
10 fund. Section 401 was plainly added as -- to protect
11 bondholders, and we believe it was intended to mean only that
12 PRIFA couldn't grant any additional liens on the property that
13 was already being pledged.

14 But most fundamentally, the pledge is the pledge.
15 Section 401 is a restriction on PRIFA's activities. It's a
16 covenant. It doesn't -- it cannot redefine the pledge. And
17 so at most what we have here is a breach of a covenant, which
18 maybe is the right result since it seems very clearly to have
19 been unartfully worded.

20 There were also numerous other provisions of that
21 paragraph in particular, Section 401, which were not complied
22 with, including the -- PRIFA withdrawing amounts and making
23 deposits itself into the Sinking Fund. I think there's no
24 dispute now that these monies, even when they were flowing,
25 were not ever held in a PRIFA bank account, and PRIFA was

1 never actually withdrawing the money or making deposits. So
2 at most, this means that some portion of Section 401 was
3 breached.

4 The Commonwealth agreements with the rum producers
5 also demonstrate that, prior to this litigation, the
6 Commonwealth didn't believe that its lien was so limited. And
7 so on slides seven and eight of the slide deck, I've included
8 brief excerpts from the Bacardi and Serralles agreements.

9 And you'll see that in Section 4.6.1 of the Bacardi
10 Agreement, on slide seven, the Oversight Board said that, "The
11 first 117 million dollars of cover over revenues received by
12 the government in each fiscal year through fiscal 2057 are
13 pledged and have to be transferred to PRIFA for deposit to the
14 credit of the Infrastructure Fund."

15 That's exactly what we contend the Enabling Act and
16 the bond documents accomplished. And the Lockbox Agreement
17 itself preserves the structure and continues to have the first
18 117 million dollars in each fiscal year deposited to the
19 credit of PRIFA. And that's reflected on slide nine of the
20 deck.

21 So this shows that, as a pure matter of law, the
22 bondholders lien is not limited to money in the Sinking Fund.
23 And we would contend that -- and that it extends to monies in
24 the Infrastructure Fund. We would contend that the monies are
25 currently being covered into the Infrastructure Fund.

1 Under the Lockbox Agreement, Citibank transfers and
2 deposits the first 117 million dollars each year to the
3 Secretary of the Treasury for deposit to the credit of PRIFA.
4 And that -- a sample of that distribution detail that goes
5 with the transfer is included on slide 18.

6 The transfers continue in this manner to this day.
7 And once deposited with the Commonwealth, the monies are
8 deposited to the credit of the Infrastructure Fund.
9 "Deposited to the credit of" does not require it to be
10 deposited into a specific bank account.

11 The Lockbox Agreement itself makes clear that the
12 Commonwealth knows well the difference between monies being in
13 -- credited to, or designated for deposit in a bank account.
14 And the language from that is on slide nine of the deck.

15 The government parties have a lot to say about what
16 the Infrastructure Fund is not, but they never actually
17 affirmatively say what it is. Our position, however, is
18 clear. As required by the Enabling Act and as disclosed in
19 the audited financial statements, the Infrastructure Fund is a
20 special fund, meaning an accounting designation rather than a
21 bank account, used to record the first 117 million dollars of
22 annual excise tax revenues.

23 The actual dollars are held in a TSA bank account,
24 but are specifically designated and tracked PRIFA monies. At
25 no time was there any other account in which the 117 million

1 dollars required by the Enabling Act to be deposited to the
2 credit of the Infrastructure Fund held. And that's even prior
3 to the withholding.

4 The Oversight Board disputes our contention that the
5 monies are currently being deposited to the credit of the
6 Infrastructure Fund. This is a purely factual dispute, which
7 is not ripe or appropriate for resolution at this juncture,
8 particularly on a limited record.

9 Movants have presented at least three pieces of
10 evidence to support their colorable claim that the
11 Infrastructure Fund is a fund maintained for accounting
12 purposes with monies corresponding to the revenues therein
13 currently held in the TSA account. First, the corporate --
14 Commonwealth corporate representative testified that the
15 Infrastructure Fund isn't a single bank account or fund, but
16 generally refers to the first 117 million dollars of rum taxes
17 earned each year.

18 Two, the disbursement detail from the Lockbox
19 account, and evidence showing that the first 117 million are,
20 in fact, being credited to account R4220 and Fund 111 to this
21 day. Three, the Commonwealth audited financials, which
22 publicly disclose the PRIFA fund as a special revenue fund
23 used to account for monies received by the Commonwealth up to
24 117 million of certain federal excise taxes levied on rum and
25 other articles. And I note that the Commonwealth cites to the

1 most recent Commonwealth audited financials, and those deviate
2 significantly in the language from the prior financial
3 statements and were only issued years after this litigation
4 began. And they clearly reflect the Commonwealth litigation
5 position and don't say anything about what is, in fact,
6 happening.

7 The fact that the 117 million dollars required to be
8 deposited in the Infrastructure Fund was only ever held in the
9 TSA account further supports our position. And the Oversight
10 Board's argument to the contrary rests on its assertion
11 without any evidence that the Infrastructure Fund may have
12 been a combination of bank accounts. And I can get into
13 detail on that, but I'm going to spare the Court for now. I
14 think it's set out in our brief.

15 THE COURT: I understand your overall point that
16 their position on what the infrastructure is, is unclear and
17 speculative.

18 MS. MILLER: Right. Thank you, Your Honor.

19 THE COURT: Thank you.

20 MS. MILLER: So one more thing. The Oversight Board
21 included in its excerpt of the statute for this hearing,
22 Section 1918 of the Enabling Act, and it was nowhere cited
23 previously. And we would contend, for good reason, we think
24 it's entirely irrelevant to this inquiry.

25 Section 1918 addresses only the money that's actually

1 being held by PRIFA. They already mentioned, there's no
2 dispute that the Infrastructure Fund is an accounting
3 designation. And as the Commonwealth corporate representative
4 testified many, many times, monies are not deposited in funds.
5 They are accounting designations. And there's a difference
6 between accounting and cash. And as the -- it's also clear
7 that it doesn't apply because Section 1918 requires PRIFA to
8 hold the cash in its possession in bank accounts in its name,
9 and Section 1914, which is on slide 11. But it's the
10 provision that obligates the transfer, confirms that the
11 Infrastructure Fund can be maintained by or on behalf of
12 PRIFA. And so, clearly, 1914 and the transfers of the
13 Infrastructure Fund are not subject to 1918.

14 So I'm going to turn -- because I'm running out of
15 time, I'm going to turn now to CCDA, and then I'll circle back
16 to additional open questions -- open issues, unless Your Honor
17 has specific questions on PRIFA.

18 THE COURT: That's fine. Please proceed.

19 MS. MILLER: Okay. So, Your Honor, CCDA is
20 different, and that's why I left it for last. And, for
21 purposes of this motion, simpler than the other revenue bonds,
22 because the hotel taxes never actually touch a Commonwealth
23 account. And that's why we're not seeking to bring a suit
24 against the Commonwealth at all with respect to these
25 revenues.

1 The CCDA bonds are governed by a suite of statutes
2 and agreements, which are described briefly on slide two of
3 the deck. And the CCDA demonstrative deck is ECF 133 --
4 13338-1.

5 THE COURT: I have that demonstrative, and I am now
6 turning to the section of it that says, CCDA demonstrative.
7 And I have found your cover sheet for the demonstrative.

8 MS. MILLER: Okay. Great. Thank you.

9 Okay. So we included, just because I know that I,
10 over the past many months, have found myself sort of having
11 trouble to keep all of the agreements that govern and
12 structure this deal clear in my mind, we put them together.
13 So there are two statutes, the CCDA Enabling Act, the hotel
14 occupancy taxes, and then four, but really three, interrelated
15 agreements: The Assignment and Coordination Agreement, the
16 Pledge Agreement, and then the two Trust Agreements.

17 The Tourism Company -- so the Hotel Tax Occupancy Act
18 gave the Tourism Company the power to impose, collect, and use
19 hotel occupancy taxes. The Tourism Company keeps all of the
20 taxes collected, and spends them for its own corporate
21 purposes. The Oversight Board misleadingly cites to the
22 statement of motives to suggest that the Tourism Company is
23 acting in a "ministerial capacity" as a collection agent for
24 the Commonwealth.

25 So the statement of motives, what the statement of

1 motives actually says -- and I'm going to read the whole
2 sentence for you. In order to continue with the development
3 of the tourism industry in our island, it is essential that
4 the Tourism Company exercise a more prominent role in the
5 collection and supervision of what represents one of its
6 principal sources of revenue so that it may continue with its
7 ministerial role to promote Puerto Rico as the premier tourism
8 destination in the Caribbean. Clearly, the other kind of
9 ministerial role.

10 It is undisputed that the Tourism Company does not
11 round trip the revenues back to the Commonwealth, as confirmed
12 by the various flow of funds documents prepared by the
13 government parties in this litigation, and the Oversight
14 Board's Sur-reply, at page one, stating that the Tourism
15 Company, "Retains them in its own accounts." Only the Tourism
16 Company must approve the pledge of the hotel taxes, and the
17 Commonwealth has no corresponding right. Neither the Tourism
18 Company nor CCDA is a Title III debtor.

19 This motion highlights the extreme behavior being
20 endorsed or imposed by the Oversight Board under the guise of
21 fairness. It is the ultimate gotcha scenario in which even
22 nondebtors can avoid obligations and benefit from the
23 automatic stay of -- simply ignoring our obligations and just
24 not transferring money into trust accounts.

25 If they don't -- just don't transfer the money, then

1 they can avoid their debt obligation, leaving bondholders with
2 rights only against an empty box, or so the Commonwealth says.
3 The Commonwealth argues that it has an interest in the hotel
4 taxes sufficient to preclude bondholders from exercising their
5 rights against CCDA and the Tourism Company, either because of
6 its inherent taxing power or by virtue of its residual
7 interest arising from the clawback right.

8 We disagree with these arguments, as explained in our
9 brief. And I'm happy to address them further if you have
10 specific questions, but I want to hold them to the end because
11 we submit that this motion should be granted, even if the
12 funds are, in fact, subject to the automatic stay.

13 So first, bondholders have -- are the beneficial
14 owners of the monies from the time they're collected, because
15 they're restricted and can only be used as required under the
16 statutes and bond documents for the ultimate distribution to
17 bondholders. Notable here is the detailed Commonwealth
18 covenants, which include the affirmative obligation to make
19 sure that the amounts that must be deposited are deposited, in
20 addition to the pledge not to also eliminate the taxes or
21 parties' rights.

22 We think that, generally, the cases that the
23 Commonwealth cites with respect to negative covenants are
24 inapplicable here, frankly. They deal with promises not to --
25 when a bank lends you money and you own a home, issue a

1 mortgage on another -- another mortgage senior to their debt.
2 On that, we just think that those have nothing to do with what
3 we're talking about here, where the Commonwealth is giving you
4 an asset and then promises that it won't not give you that
5 asset. So essentially, even the negative covenants are double
6 negative covenants, so they are affirmative covenants.

7 But the Commonwealth here just cites the same string
8 cite of cases, and doesn't even address the fact that there is
9 a clear, affirmative and direct obligation of the Commonwealth
10 itself. And the Commonwealth also agrees to be bound and to
11 comply with all of the applicable bond documents. But even if
12 Your Honor doesn't agree that the bondholders are the
13 beneficial owner of the property, such that the Commonwealth
14 lacks any equity in the funds and makes them definitionally
15 unnecessary for a restructuring, there's no dispute that the
16 bondholders have a lien on the revenues deposited in the
17 transfer account, which we contend is still happening.

18 The arguments here center on a factual dispute about
19 which bank account is the transfer account. The factual
20 dispute, as in PRIFA, should be decided in the underlying
21 action and not on this motion. The Court is not charged with
22 definitively resolving the issues, particularly not on the
23 limited record, but instead has to determine whether movants
24 have demonstrated a plausible claim to the property, or said
25 in the converse, whether the Oversight Board has demonstrated,

1 based on the evidence, that we have no plausible basis to
2 suggest that we have a claim.

3 The Oversight Board's arguments for why Scotiabank --
4 the Scotiabank's 5142 account -- and I'm going to refer to
5 some of the bank accounts, so let me just find this slide so I
6 don't lose you.

7 So if you look at slide 11 in the deck, this is the
8 flow of funds, a slightly modified version of the flow of
9 funds, only by adding the red writing that was produced to us
10 in litigation.

11 The COURT: Yes. So this is the one that is headed
12 January 2015 to November 2015?

13 MS. MILLER: Exactly.

14 THE COURT: One of the things that I have in --
15 unfortunately to do, working with two screens here, is to
16 click the wrong screen and put something back. But I'm back
17 there. I'm good. Thanks for your patience.

18 MS. MILLER: Okay. You're welcome. So we're all
19 set?

20 THE COURT: Yes.

21 MS. MILLER: Okay. Thank you, Your Honor.

22 The Oversight Board's argument -- so you see that on
23 this, if you look at slide 11, there's -- the monies are
24 collected by the hoteliers, and then they're transferred into
25 the Scotiabank 5412 account, which is the Tourism Company

1 account. And that's the account that we contend is the
2 transfer account. It then, during this period, got moved into
3 the GDB 9758 account, which is the account that the Oversight
4 Board contends is the transfer account. So just so you have
5 that sort of clear in your mind.

6 THE COURT: I do understand those positions. Thank
7 you.

8 MS. MILLER: Thank you. They do -- potentially in
9 material ways, but potentially not.

10 So the Oversight Board's arguments for why the
11 Scotiabank 5142 account is not the transfer account are based
12 on pure speculation, or arguments that would also defeat their
13 arguments about which bank account corresponds to which
14 account identified in the relevant documents.

15 For example, if the Oversight Board is correct that
16 the Scotiabank 5142 cannot be the transfer account because it
17 was opened in 2011, which is a fact not supported by the
18 evidence, including the documents that they cite in their
19 Sur-reply, then the Scotiabank 5144 account, which is the one
20 designated with the yellow star to the right, which is the
21 account that the Oversight Board contends is the surplus
22 account, also can't be the surplus account, because that
23 account was also opened, as the Oversight Board admits, years
24 after the agreement.

25 It's more logical to assume that both Scotiabank

1 accounts are successor accounts to accounts that were
2 previously established. And nothing in the bond documents or
3 otherwise restricts the transfer account to being a single
4 bank account that can never change. That's particularly, I
5 mean, relevant here where you're talking about deals that
6 stand, you know, 50 years.

7 There is no affirmative evidence identifying any
8 account as the transfer account. The Oversight Board's
9 assertion about which one is based purely -- is the transfer
10 account is based purely on inadmissible hearsay. Their
11 witness testified that he spoke to someone else who said that
12 it was the transfer account, but he has no idea and hasn't
13 seen any documents that support that.

14 The Oversight Board's theory also requires the Court
15 to ignore the affirmative evidence we do have regarding the
16 GDB 9758 account, describing it as the rum tax concentration
17 surplus account, and the lack of any evidence at all
18 identifying the Scotiabank 5144 account as the surplus
19 account.

20 The Oversight Board argues that the Court should
21 ignore the labels attached to the accounts and consider
22 instead how the accounts were used to conclude which account
23 is the transfer account. Again, the Court should not be
24 making factual conclusions on the Lift Stay motion. But
25 second, the flow of funds doesn't support the Oversight

1 Board's theory any more than it does ours.

2 Key facts are omitted in their demonstrative, which
3 are reflected on slide 11, that defeat their assertion.
4 First, there are outflows. Their witness testified that there
5 are outflows from the GDB 9758 account, which would be
6 consistent with it being the surplus account but not
7 consistent with it being the transfer account.

8 And they also don't identify the fact that the
9 Scotiabank 5144 account is a commingled account that holds
10 monies that are entirely unrelated to the tax revenues.
11 There's no -- they give no explanation for why you would have
12 a commingled account that is part of the Special Holding Fund,
13 which has particular accounting requirements attached to it,
14 why you would want to subject other monies, or why it would
15 even be appropriate to subject other monies to that.

16 The Enabling Act contemplates that the Tourism
17 Company will transfer the money to the GDB for deposit into
18 the pledge account every month, not that the money is already
19 being held in a GDB account. And to the extent the Oversight
20 Board wants to argue, well, that just means in a GDB held
21 account, and the GDB 9758 account is a Tourism Company
22 account, the evidence would show that -- and this is Hughes'
23 Declaration, Exhibit 43, which I apologize is not in the
24 demonstrative at CCDA_stay0006785, just so the cite is on the
25 record, that the agency, the depository agency and the agency

1 listed on that account is actually CCDA, not the GDB. The
2 Oversight Board, as -- its third account into the flow, that's
3 nowhere described or mentioned, is the GDB 9758 account. It's
4 the surplus account, as stated in the official Tourism Company
5 and GDB records.

6 Then predefault, the monies flowed through only
7 accounts identified in the relevant documents. The transfer
8 account, the surplus account, the pledge account, and the bond
9 payment fund. AAFAF did not provide any flow of funds
10 information predating January 2015, so honestly, we just don't
11 know whether the flow of monies into the GDB 9758 account
12 always happened from the time these bonds were issued or
13 whether it was a later change to help ameliorate the GDB's
14 dire liquidity position in later years.

15 Sending all of the monies to the GDB surplus account
16 daily, rather than directly to the pledge account monthly,
17 would have allowed the GDB to benefit from the float on the
18 funds. We don't have affirmative evidence, but it's just as
19 likely as any of the Oversight Board's theories.

20 The Oversight Board argues that the GDB 9758 account
21 can't be the surplus account because the monies flow in and
22 out of the account subject to movants' lien, causing the lien
23 to attach and detach. This just misunderstands our lien,
24 which is not a lien on a deposit account. That's why I don't
25 need a deposit control agreement. But it's a lien on the flow

1 of funds, and once it attaches, it doesn't matter what bank
2 account or what you do with it, the lien, they're always
3 subject to the lien.

4 Even -- I just want to, in my last minute, say that
5 even if the Oversight Board were right about which account is
6 the transfer account, movants still have a lien on the monies
7 in the Scotiabank 5142 account. And this is because, at slide
8 three, there is the grant, and the Tourism Company expressly
9 agreed to be bound by all of the agreements, and passed a
10 corporate resolution, so they're equally bound by the Pledge
11 Agreement.

12 And it includes in the collateral, one, the hotel
13 occupancy tax revenues, which mean the monies deposited in the
14 transfer account; two, the monies deposited in, or required to
15 be deposited in the pledge account pursuant to the provisions
16 of the pledge agreement.

17 Now, they say, well, that doesn't extend -- that
18 doesn't give you anything other than monies in the transfer
19 account. And so the Oversight Board's argument is that 2-B,
20 the pledge in 2-B gave me a security interest in, one, money
21 in the transfer account, and then two, money in the pledge
22 account or money in the transfer account.

23 Well, that doesn't seem to be a logical reading of
24 the provision, and nothing indicates that the words "or
25 obligated to be transferred into" means -- refers only to the

1 directly preceding transfer. And, in fact, you know, the
2 nature of this agreement, and the deal, and the fact that
3 they're all interrelated agreements makes pretty clear that it
4 logically refers to the monies that had to be transferred in
5 from the beginning of the flow. If at any time they had to
6 get to the pledge account, then they're included in the
7 pledge.

8 And this is -- this is clear when you look at the
9 pledge agreement on slide four. For example, Section 5-B
10 requires the GDB -- do you want me to just finish the
11 sentence -- to put -- to diligently enforce its rights under
12 the assignment agreement, including enforcement of the Tourism
13 Company's obligation to transfer the hotel occupancy taxes
14 into the transfer fund.

15 THE COURT: And I had promised that -- I had taken a
16 minute or so to fiddle around, so if you have something else
17 you want to state quickly, you may.

18 MS. MILLER: Okay. So I just wanted to touch briefly
19 on the delegation of taxing authority and Your Honor's
20 question with respect to PRIFA -- sorry, with respect to
21 COFINA, and isn't the language there more clear. You know,
22 again, like Mr. Ellenberg said, delegation is a proper
23 exercise. And the reliance, as I noted on the statement of
24 motives, is not to the contrary. Actually, I think it
25 supports our facts by indicating that they are Tourism Company

1 revenues. But also, this case is entirely distinguishable
2 from COFINA.

3 In COFINA, you had taxes, sales and use taxes, which
4 were being collected by the Commonwealth. And it was only a
5 fraction, a small slice of that revenue stream. You know, one
6 slice goes to the municipalities, one slice goes to COFINA,
7 the rest of it goes to the Commonwealth. You had to make
8 clear in that -- because COFINA lacked all of the indicia of
9 ownership.

10 The same isn't true here. Once you gave the Tourism
11 Company the authority to impose the tax and collect it, and to
12 use it as it sees fit, and to pledge it where the Commonwealth
13 doesn't need to and consent to that, you don't need to
14 expressly say, and I'm giving you ownership. Nobody would
15 ever think -- and that is why these monies in the cash
16 restriction analysis are actually being held by the Tourism
17 Company in a debt service reserve fund to this day.

18 And the Oversight Board indicated that those --
19 designated those funds, as restricted in its class restriction
20 analysis, and ones that the Oversight Board doesn't have
21 access to, because it can't reduce appropriations to CC -- to
22 the Tourism Company to basically, you know, make CCDA spend --
23 part of the Tourism Company, spend its money on hand rather
24 than through appropriations.

25 So I just wanted to respond to Your Honor's question

1 on that as well.

2 THE COURT: Thank you very much.

3 MS. MILLER: Thank you, Your Honor.

4 THE COURT: And so this concludes the movants'
5 opening arguments, and I think that this is an appropriate
6 time for our ten-minute break. After the break, we'll come
7 back and hear from the DRA parties, and then the objecting
8 parties, and then rebuttal.

9 So I'm going to -- we are starting a ten-minute break
10 now. Please everybody hang up and then dial back in in ten
11 minutes. Thank you.

12 MS. MILLER: Your Honor, I was reminded just before
13 we take a break, as a housekeeping matter, we would like to
14 move into evidence the exhibits that were submitted in ECF
15 13339-2, 13338-2 and 13341-2.

16 THE COURT: Is there any objection?

17 (No response.)

18 THE COURT: Hearing none -- I'm sorry. Is that an
19 objection?

20 (No response.)

21 THE COURT: No. Okay. So hearing none, the exhibits
22 in the enumerated docket entries are received into evidence.

23 So the ten minutes starts from now.

24 MR. BIENENSTOCK: Your Honor, this is Martin
25 Bienenstock. I apologize. I was trying to get off mute. I

1 forgot I was asked to mute my phone on the dashboard.

2 THE COURT: All right.

3 MR. BIENENSTOCK: So I unmuted my phone but --

4 THE COURT: All right.

5 MR. BIENENSTOCK: We absolutely object. This was
6 oral argument. We'd want to go through -- we have all kinds
7 of problems with their exhibits, their deposition questions,
8 et cetera. This was supposed to be oral argument, not an
9 evidentiary hearing, and we do object to admitting what
10 Ms. Miller asked to be put into evidence.

11 And offhand, I mean, it was so quick, I don't even
12 know what exhibits she's talking about, but we definitely
13 object.

14 THE COURT: Well, Mr. Bienenstock does make a good
15 point that we have oral argument, and the things that were
16 submitted with the various original submissions and that have
17 been highlighted here are part of the record on this Lift Stay
18 proceeding at this point. So I'm not sure that it is
19 necessary for me to receive into evidence matters that have
20 been put up for my consideration in connection with this
21 preliminary hearing.

22 Ms. Miller.

23 MS. MILLER: Your Honor, we actually spent days
24 exchanging lists of the exhibits that we wanted included as
25 part of the record. They are the exhibits that were attached

1 to the various briefs, plus just a couple of supplemental
2 documents.

3 The Oversight Board actually gave us their
4 objections, including a number which were based on hearsay.
5 We agreed, as reflected in the submitted materials. We
6 addressed all of their objections to their satisfaction,
7 including making clear that we weren't relying on certain
8 documents for the truth of the matter. I'm just not sure --
9 the idea that I'm springing this on them is false.

10 We, for a long time, went back and forth. And
11 frankly, if the Oversight Board had a fundamental objection to
12 this, they should have and could have articulated it earlier.
13 I mean, I'm not sure what the practical difference is other
14 than from our perspective, having a clean record of, you know,
15 what are the factual documents that are being considered by
16 the Court in connection with these motions.

17 THE COURT: Well, lest we take another hour here
18 trying to look independently through PDFs, I will take
19 Ms. Miller's request under advisement. The materials that
20 have been filed are part of the court record at this point.

21 And I would ask that you meet and confer, and as
22 promptly as possible, give me a joint letter on your positions
23 as to whether it's necessary to receive things in evidence.
24 And to the extent one side or the other believes that things
25 should be received, and the other believes there are preserved

1 objections to that, lay that position out. And let's say that
2 joint report must be filed by a week from now. But it should
3 also apply to anything that the Oversight Board would be
4 trying to introduce that the movants would object to.

5 So that is by June 11th, you will file a joint status
6 report, all right?

7 MR. BIENENSTOCK: Thank you, Judge.

8 MS. MILLER: Thank you, Your Honor.

9 THE COURT: Okay. Thank you.

10 Now, talk to you in ten minutes. 11:20, by my clock.

11 (At 11:11 AM, recess taken.)

12 (At 11:20 AM, proceedings reconvened.)

13 MS. NG: Okay, Judge.

14 THE COURT: Yes.

15 MS. NG: Things are pretty much okay. I think
16 everyone's on who's supposed to be on. Let me just check. I
17 think mostly counsel are on.

18 THE COURT: Do you have there Ms. Miller,
19 Mr. Ellenberg, Mr. Mintz, Mr. Zouairabani, Mr. Bienenstock,
20 Ms. McKeen?

21 MR. BIENENSTOCK: Yes, Judge. This is Martin
22 Bienenstock.

23 MS. NG: Yes. I don't see Ms. Miller yet. I do see
24 Mr. Ellenberg on.

25 MR. ELLENBERG: Yes, I'm on. Can you hear me?

1 MS. NG: Yes, I can hear you.

2 MR. ELLENBERG: Great. Thank you.

3 MS. MILLER: I'm on as well. It's Ms. Miller.

4 THE COURT: Ms. Miller is on. Okay. Very good.

5 We're just trying to check. Ms. Ng has the screen that shows
6 who's on.

7 So I want to make sure that everyone who is arguing
8 is on. So actually, I'll also do this just by asking you to
9 respond "present" or not.

10 Mr. Mintz, are you present?

11 MR. MINTZ: Yes. Good morning, Your Honor. This is
12 Doug Mintz.

13 THE COURT: Good morning.

14 Mr. Zouairabani.

15 MR. ZOUAIRABANI: Yes, Your Honor. Present. Good
16 morning.

17 THE COURT: Good morning.

18 Mr. Bienenstock, you said you're here?

19 MR. BIENENSTOCK: Yes, Your Honor.

20 THE COURT: Good morning again.

21 Ms. McKeen?

22 MS. MCKEEN: Yes, Your Honor. I'm here.

23 THE COURT: Good morning.

24 Mr. Despins?

25 MS. NG: He's on.

1 MR. DESPINS: Yes, Your Honor. Good morning. I was
2 muted. Sorry.

3 THE COURT: Good morning. I'm sorry. I know the
4 muting is complicated, and so I will wait for you to unmute
5 yourselves a little longer than I did with Mr. Bienenstock
6 earlier. And thank you for doing that double muting thing.

7 And Mr. Zwilling, are you on?

8 MR. ZWILLINGER: Yes. Good morning.

9 THE COURT: Good morning.

10 Ms. Coffino, are you on?

11 MS. COFFINO: Yes, Your Honor. Good morning.

12 THE COURT: Good morning.

13 All right. I think all are present and accounted
14 for. And so we will now --

15 MS. NG: Judge?

16 THE COURT: Yes.

17 MS. NG: I'm sorry to bother you one more time. I
18 need to remind everybody to please, when you're not speaking,
19 to mute your phone and your computer, because I still see
20 people are not muted. Okay.

21 Sorry, Judge.

22 THE COURT: Thank you, Ms. Ng.

23 And Counsel, please do comply so we don't have random
24 noises from people's houses.

25 So with that, I will turn now to the argument for the

1 DRA parties in connection with the HTA Lift Stay Motion. I
2 have a ten-minute time allocation. Who will be speaking?

3 MR. MINTZ: Good morning, Your Honor. It's Doug
4 Mintz of -- excuse me. Good morning. It's Doug Mintz of
5 Orrick on behalf of Cantor-Katz. I will be speaking for five
6 minutes, and then Mr. Zouairabani will be speaking for five
7 minutes.

8 THE COURT: Very well, then. So Mr. Mintz, please
9 proceed.

10 MR. MINTZ: Thank you, Your Honor.

11 In accordance with Judge Dein's March 3rd Order, the
12 DRA parties were prohibited from taking discovery, and we
13 reserve all our rights with respect to our Lift Stay Motion
14 and lien until we've had a full opportunity to address them.
15 But as I said a moment ago, this is Doug Mintz. I'm here for
16 Cantor-Katz on behalf of the DRA parties. And Mr. Zouairabani
17 is here from McConnell Valdes for AmeriNat as well.

18 We've briefed a handful of issues, and today we want
19 to focus on just two. I'll address the preemption, whether
20 PROMESA can preempt our lien, and Mr. Zouairabani will address
21 whether the excise tax statutes, Act 31 and 30, create
22 appropriations.

23 With respect to preemption, PROMESA cannot and does
24 not extinguish the DRA's liens on and rights to the Act 30 and
25 31 revenues, whether through preemption or otherwise. The

1 Oversight Board argues they aren't preempting the liens, but
2 rather just the revenue streams, by drawing away the
3 collateral itself. The impact is the same under the law.
4 Doing so would be inconsistent with the Constitution, policy
5 and applicable statutes and case law.

6 The Oversight Board has taken the view that PROMESA,
7 largely through the budgeting and fiscal plan process,
8 preempts significant chunks of Commonwealth law. This Court
9 has already rejected the Oversight Board's view, stating that
10 the Oversight Board has not been given the power to
11 affirmatively legislate.

12 Thus, with respect to policy measures that would
13 require appeal or modification of existing Commonwealth law,
14 the Oversight Board has only budgetary tools and negotiations.
15 Nevertheless, the Oversight Board pushes ahead again here,
16 placing its faith in Section Four of PROMESA, which states
17 that the provisions of PROMESA preempt specific provisions of
18 territory law that are inconsistent with PROMESA. But the
19 plain language of Section Four makes clear that Congress
20 intended PROMESA to supplement, not supplant, territorial law.

21 The Oversight Board asserts that Congress expressly
22 preempted Acts 30 and 31 through the budget and fiscal plan
23 processes delineated in Sections 201 and 202 of PROMESA. They
24 state that because the Oversight Board never certified fiscal
25 plans and budgets providing for the appropriations required

1 under Acts 30 and 31, and because enforcing those statutes
2 would, "make it impossible for the Oversight Board to
3 restructure the Commonwealth debt and fulfill its mandate, the
4 excise tax statutes, therefore, are preempted."

5 This argument is unavailing. Their argument would
6 create significant policy concerns about PROMESA. Property
7 rights are expressly protected under both the Fifth Amendment
8 of the U.S. Constitution and the Puerto Rico Constitution.
9 The Supreme Court has held repeatedly that, "However great the
10 Nation's need, private property shall not be thus taken, even
11 for a wholly public use, without just compensation." That's
12 Justice Brandeis in *Radford*, 295 U.S., at 602.

13 The fact that enforcements of Acts 30 and 31 are
14 inconvenient to our restructuring does not give the Oversight
15 Board or Congress the ability to write property rights out of
16 existence when it suits them. That would create an array of
17 problems that are not before the Court today.

18 But if the law was intended to supercede the Fifth
19 Amendment, is PROMESA even valid? While the Oversight Board
20 wonders about the ability to confirm the Plan under the
21 current statute, the Court should also consider a world where
22 Congress permits determination of valid liens without just
23 compensation. The Court would fair better to follow the
24 Supreme Court's lead and assume that Congress did not
25 expressly violate the Fifth Amendment in the absence of an

1 express statement of Congress, citing to *U.S. v. Security*
2 *Industrial Bank*, 459 U.S. 70.

3 The Oversight Board further suggests that Congress
4 may somehow extinguish the revenue source of the
5 appropriations behind the lien, but preserve the property
6 rights in the lien. They argue that this Court and the First
7 Circuit have found that all appropriations not expressly
8 included in the Oversight Board's budget are preempted, but
9 that's a wildly overbroad reading of this Court and
10 Judge Kayatta's prior opinions, which talk about whether a
11 governor can spend outside the budget. It also turns on the
12 meaning of appropriations, which Mr. Zouairabani will address
13 shortly.

14 In any event, extinguishing the funding source of
15 those revenues without providing adequate replacement value
16 nullifies the value of the DRA's interest in the excise tax
17 statutes -- the excise tax statute revenues and amounts to a
18 taking just the same. See *Armstrong v. U.S.*, 364 U.S. 40, at
19 48.

20 And finally, a close look at the statute, as
21 Ms. Miller noted, reveals that Congress did not intend to
22 preempt applicable Commonwealth law here. For instance,
23 Section 201(b)(1)(N) provides that any fiscal plan must
24 respect the priorities, and also the liens, of the
25 Commonwealth. Therefore, it's clear Congress intended, as

1 you'd expect, to preserve the DRA's property rights and
2 revenue streams behind them.

3 So with that, I will turn things over to
4 Mr. Zouairabani to discuss the meaning of appropriations.

5 THE COURT: Thank you very much.

6 Mr. Zouairabani.

7 MR. ZOUAIRABANI TRINIDAD: Thank you, Your Honor.
8 Good morning. Attorney Nayuan Zouairabani from McConnell
9 Valdes on behalf of AmeriNat.

10 Before we delve into the appropriations discussion,
11 we'd like to clarify two points regarding the lien issues in
12 the HTA motion. First, the various positions as to the extent
13 and validity of the monolines' lien have already been outlined
14 in our papers, and I will not repeat them.

15 Second, it is important to distinguish that the liens
16 in controversy at this juncture are the monolines', and the
17 controversy on whether HTA presented a lien over the excise
18 tax statutes has not been raised in these proceedings and are
19 not among the issues before the Court for adjudication. With
20 these two clarifications, we move on to the topic of
21 appropriations.

22 Your Honor, the FOMB is relying on the presumption
23 that the excise tax statutes, including Acts 30 and 31, are
24 both belonging to the Commonwealth, which the Commonwealth
25 "appropriate" to HTA. However, the FOMB has never supported

1 | this presumption, other than implying that it is common sense,
2 | and that any other interpretation would make it impossible for
3 | them to restructure the Commonwealth debts and fulfill its
4 | mandates.

5 | As explained in our briefs, appropriations with
6 | legitimate authorization to address that, from the state
7 | treasury, to dispense for a specific purpose or project, only
8 | funds that are available in the state treasury and under the
9 | legislature's control for purposes of annual budgeting may be
10 | subject to appropriations. This concept has not only been
11 | adopted in the United States. It has been expressly
12 | incorporated as part of the federal budgeting scheme.

13 | Now, while the Puerto Rico Constitution does not
14 | define appropriation, Sections Six and Seven of Article VI
15 | provide us with a guideline on how they work. That is,
16 | appropriations are set in the Commonwealth budget in a fiscal
17 | year by fiscal year basis.

18 | With this framework in mind, we turn to the structure
19 | of Acts 30 and 31. These provide that, number one, revenues
20 | shall be covered into a special deposit for the benefit of
21 | HTA. Two, they were created for the specific purpose of
22 | particular creditors of HTA. And three, the Commonwealth does
23 | not have the authority to divert them to the General Fund.

24 | As Mr. Ellenberg explained, the only extraordinary
25 | exception is when there's a valid clawback. To date, no court

1 has addressed whether a clawback has been properly activated
2 by the Commonwealth. And in any event, the only use of the
3 clawback funds is for payment of GO bonds. It is not for the
4 Commonwealth General Fund and use. And two, solely for a
5 particular period of time. It is not perpetual.

6 Acts 30 and 31 revenues are, thus, not
7 appropriations, because, by the statute's own terms, they do
8 not flow into the Commonwealth's General Fund and are not
9 subject to annual budgetary allocations in the Commonwealth's
10 budget. To this, the FOMB relies on the First Circuit's
11 decisions in *Vazquez Garced* and *Andalusian*. However, the
12 facts that they state are wholly inapplicable to Acts 30 and
13 31.

14 *Vazquez Garced* involves the reprogramming of budget
15 extensions from prior fiscal years, while *Andalusian* involves
16 a statute that specifically required annual funding of
17 mandatory contributions to the retirement system. Both of
18 these decisions revolve around controversies over particular
19 items and the annual Commonwealth budget that requires
20 specific budgetary allocations, whereas Acts 30 and 31 do not
21 contain any such requirement.

22 The FOMB's reliance on a 2005 opinion of the Puerto
23 Rico Secretary of Justice to the effect that the Excise Tax
24 Statute creates a "standing appropriation" also falls flat,
25 because, as explained by the Puerto Rico Supreme Court in *In*

1 Re: *Secretary of Justice*, AGR opinions 955, the opinions of
2 the Secretary of Justice do not in any way bind the Court.

3 In conclusion, the FOMB has failed to show why Acts
4 30 and 31 should be treated as appropriations. Therefore, the
5 Act 30 and 31 revenues cannot be modified through the
6 budgetary certification process, because they are not
7 Commonwealth funds and are not subject to annual budgetary
8 appropriations.

9 The Puerto Rico legislature knows how to create
10 appropriation statutes. In fact, we have listed a number of
11 such statutes in our briefs. If the legislature wanted to
12 subject Act 30 and 31 revenues to annual budgetary
13 appropriations, it could have categorically stated so, but
14 they did not. By now reclaiming these revenues as
15 "appropriations" and diverting them to certified budgets, the
16 FOMB is effectively repealing Acts 30 and 31, which authority
17 the FOMB does not possess, as specifically dictated by this
18 Court and affirmed by the First Circuit.

19 And with that, Your Honor, I'll leave it at that
20 unless the Court has any questions.

21 THE COURT: Thank you very much. I have no questions
22 for you.

23 MR. ZOUAIRABANI TRINIDAD: Thank you, Your Honor.

24 THE COURT: So now we will turn to the objecting
25 parties, beginning with the Oversight Board, to which I have

1 an allocation of 60 minutes and Mr. Bienenstock identified as
2 the speaker.

3 Mr. Bienenstock?

4 MR. BIENENSTOCK: Yes, Your Honor. Good morning.

5 THE COURT: Good morning.

6 MR. BIENENSTOCK: And we have separate allocations
7 for AAFAF, I believe.

8 THE COURT: Yes. What I have is 60 minutes for the
9 Oversight Board, 15 minutes for AAFAF, ten minutes for the
10 UCC, and five minutes for Bacardi.

11 MR. BIENENSTOCK: Okay. Thank you. Thank you.
12 Well, good morning. Martin Bienenstock with Proskauer Rose,
13 LLP, for the Oversight Board, as Title III representative of
14 the Commonwealth. And once again, Your Honor, the Board and
15 myself would like to wish everyone good health and hope that
16 we're all back together soon, and in San Juan.

17 My argument intends to start with principles
18 applicable to all of HTA, PRIFA and CCDA, and then to address
19 certain unique aspects of each entity's transactions with the
20 bondholders. In explaining some of the general principles,
21 however, I have to use some specific examples from the three
22 entities.

23 Before addressing the substance, I want to make clear
24 what the Oversight Board believes is the standard of proof
25 today. The Court has directed the litigants to address

1 standing and property interests. The Oversight Board submits
2 the monolines must prove a reasonable likelihood of prevailing
3 on the issue that the Commonwealth does not have a property
4 interest in a revenue stream before the Court can rule no stay
5 relief is required in the Commonwealth's Title III case.

6 Monolines have proffered two contrary positions to
7 that burden of proof. First, they contend they only need to
8 establish a colorable claim. As Ms. Miller said a few moments
9 ago, a plausible claim. The monolines adopt the colorable
10 claim standard from the First Circuit's *Grella* opinion, but in
11 what I will show is a recurring theme in their legal and
12 factual assertions, they omit the First Circuit's explanation
13 of what it means by colorable.

14 What the First Circuit ruled at 42 F.3d, page 34, is,
15 "Put another way, in employing the preliminary injunction
16 analogy discussed above, a creditor must show a reasonable
17 likelihood that it has a meritorious claim, and the court may
18 consider any defenses or counterclaims that bear on whether
19 this reasonable likelihood exists."

20 Just parenthetically, Your Honor, I would say among
21 those defenses and counterclaims is preemption. We disagree
22 with the movants that preemption is not an issue today.

23 Second, the monolines' PRIFA sur-sur-reply argues in
24 paragraph one, "That the Oversight Board found it necessary to
25 respond at length in sur-reply briefing to movants' legal and

1 factual arguments is proof positive that movants have
2 demonstrated a colorable claim to the pledged rum tax."

3 I will not waste time repeating the proposition that
4 a litigant's reply to lengthy briefs based on new accounting
5 arguments means the moving party must have a colorable claim.
6 It refutes itself.

7 Now to the substance. Your Honor, the old proverb
8 that a chain is as strong as its weakest link sums up the key
9 issue in each of the three bond transactions. In a nutshell,
10 the Oversight Board contends that the Commonwealth's
11 pre-PROMESA statutory obligation to appropriate or transfer
12 certain revenue streams from itself, by or through the Tourism
13 Company, to HTA, PRIFA and CCDA, is at most a prepetition
14 unsecured obligation that can and must be breached in the
15 Commonwealth's Title III case.

16 Two venerable legal principles supported by common
17 sense and logic compel that result. First, every state and
18 territory in the United States has laws requiring entities to
19 honor their contracts and their statutory obligations,
20 including obligations to pay debt. Until now, no one would
21 even question that these contracts and laws are subject to
22 rejection or breach in bankruptcy where contractual
23 obligations are impaired, debt is discharged, and the debtor
24 pays the amounts required by the bankruptcy law. The
25 supremacy of the bankruptcy law over local law through

1 | preemption mandates that result. Otherwise, there can be no
2 | bankruptcy.

3 | The monolines have provided no reason why the Puerto
4 | Rico statutes requiring the Commonwealth to transfer or
5 | appropriate revenue streams to its instrumentalities can and
6 | must be specifically enforceable and nondischargeable, while
7 | the Commonwealth's promises to pay its own debt are not. An
8 | unsecured obligation is an unsecured obligation, whether it is
9 | an obligation -- whether it is an obligation to pay or an
10 | obligation to transfer.

11 | Now, in *Ohio v. Kovacs*, 469 U.S. 274, at page 279,
12 | the United States Supreme Court ruled that bankruptcy
13 | discharges claims regardless of their origin in contract or
14 | statute. It said, "It makes little sense to assert that
15 | because the cleanup order was entered to remedy a statutory
16 | violation, it cannot likewise constitute a claim for
17 | bankruptcy purposes. Furthermore, it is apparent that
18 | Congress desired a broad definition of a 'claim' and knew how
19 | to limit the application of a provision to contracts when it
20 | desired to do so."

21 | Your Honor, I just want to mention hypo -- or
22 | parenthetically, that contrary to some of the arguments
23 | earlier, if you look at many of the movants' briefs, including
24 | their latest PRIFA Sur-sur-reply Brief just a week ago, they
25 | say at paragraph 23, "And under settled law, statutory

1 contracts, such as the statutory covenant between the
2 Commonwealth and PRIFA bondholders in the PRIFA Enabling Act
3 are no different." And in the context, it's no different than
4 claims, non-statutory claims.

5 Second, the Commonwealth --

6 THE COURT: Mr. Bienenstock.

7 MR. BIENENSTOCK: Yes.

8 THE COURT: It seems to me that these arguments on
9 your side and the arguments on the monoline side just proceed
10 from very different fundamental assumptions. The monolines'
11 arguments say that these -- what you characterize as unsecured
12 contracts should and are actually transfers of property
13 rights. And you say that they're not.

14 If they're not, your argument that they're an
15 unsecured claim that can be affected by bankruptcy makes
16 perfect sense. If they are security arrangements, you have
17 the problem that debtors have with secured claims in
18 bankruptcy.

19 And so I'll hear this as your, you know, introduction
20 to a deeper dive on why they're wrong on reading the statutes
21 and the agreements the way they do. It seems to me that would
22 be wise for me --

23 MR. BIENENSTOCK: Sure. Your Honor, I -- although I
24 think I get to that in a little more depth a little later on
25 in my argument, I'd like to offer the following just right now

1 in response while it's fresh in mind.

2 I think Your Honor's questions early in the morning
3 to Mr. Ellenberg really provided the answer, which is in the
4 statutes he's referring to, there's no words of pledging or
5 granting a lien. So whereas I totally agree that if something
6 is preempted that is a secured property interest somehow,
7 there has to be adequate compensation under the Fifth
8 Amendment.

9 But if there's a statute that creates an undertaking
10 to transfer, and let's -- as I just said earlier, in this
11 case, we have obligations of the Commonwealth to transfer
12 money to instrumentalities. We have promises of the
13 Commonwealth to pay the, for instance, General Obligation
14 bondholders.

15 Both are obligations to transfer money. Neither one
16 is secured. Just as clearly as the obligation, the promise to
17 pay the bondholders is unsecured and it's preempted and it's
18 breached, the obligation to transfer money to
19 instrumentalities is unsecured.

20 And here, it would lead to a completely absurd result
21 if it were not, but we don't have to go that far because I
22 think it's clear. But the absurd result that would occur is
23 the -- I'm going to get to this in a minute. The
24 instrumentality bondholders would be paid in full.

25 The obligations to transfer money to

1 | instrumentalities would be treated as nondischargeable,
2 | specifically enforceable obligations, notwithstanding that
3 | Title III doesn't have any nondischargeable claims and doesn't
4 | provide for any specific performance.

5 | And that would leave virtually nothing for the
6 | creditors the Commonwealth promised to pay, the GO creditors
7 | and all the other creditors. So, I mean, that's the essence
8 | of our answer.

9 | If there is -- if there are words that create a
10 | security interest, that's one thing, a Fifth Amendment rights
11 | to the adequate compensation. But if there are promises to
12 | move money, that's just an unsecured claim, and the Fifth
13 | Amendment is not invoked.

14 | THE COURT: Thank you.

15 | MR. BIENENSTOCK: The Commonwealth obligation would
16 | be if it's treated -- or the Commonwealth's appropriation
17 | obligations would be treated contrary to the equality policy
18 | under which creditors of the same rank share losses equally.

19 | Instead, the Commonwealth obligation would be treated
20 | as a nondischargeable, specifically enforceable obligation to
21 | transfer billions to HTA, PRIFA and CCDA, pay their
22 | bondholders in full, while the Commonwealth's own creditors,
23 | including the GO bondholders, would absorb all the losses and
24 | possibly be paid nothing.

25 | It is very important to recognize the obvious here.

1 Namely, it is outside bankruptcy that the law generally
2 requires every entity to keep all its promises, and equitable
3 remedies, such as equitable ownership and trust, are sometimes
4 ordered to compel entities to honor their obligations.

5 Indeed, Article I, Section 10, of the U.S.
6 Constitution bars states from enacting legislation impairing
7 contractual obligations. Article II, Section Seven, of the
8 Puerto Rico Constitution does the same. That's because the
9 U.S. Constitution reserved to federal law the power to
10 authorize impairment of contractual obligations.

11 So inside federal bankruptcy, the worst thing a
12 debtor can do is to keep one promise, such as the promise to
13 transfer revenues to the three entities here, while breaking
14 all other promises. In bankruptcy, the equality policy
15 requires a debtor to break all its unsecured promises so
16 everyone shares the losses equally.

17 In opposition, the monolines' claim is best typified
18 at paragraph two of their PRIFA motion dated January 31, 2020.
19 And I won't read the whole thing, but in that paragraph they
20 claim that, in exchange for buying the bonds, and the
21 Commonwealth promising not to impair PRIFA's rights, and, you
22 know, the Commonwealth's promise to maintain the
23 appropriations, that they claim the Commonwealth alienated all
24 of its ownership rights over those revenues, while at the same
25 time disclaiming any liability for PRIFA's debt.

1 As the quid pro quo for the nonrecourse nature of the
2 debt, PRIFA bondholders were granted an immediate protected
3 lien on the tax revenue stream until the bonds were paid in
4 full. In other words, they say PRIFA is the equitable owner
5 of the rum taxes, and its bondholders have a perfected lien
6 against them. What they say is the facts and the legal
7 outcome, we say is simply their desire, but nothing more than
8 their desire, completely refuted by what the documents say.

9 There are several reasons why the monolines' claims
10 that the Commonwealth alienated all its ownership rights, that
11 PRIFA, HTA and CCDA are the equitable owners, and that the
12 bondholders have a perfected lien on the revenues are wrong.
13 First, each of the three deals expressly renders the revenue
14 stream subject to the Commonwealth's retention or clawback
15 rights. Monolines do not deny that fact. Rather, they now
16 contend in paragraph three of the CCDA sur-sur-reply that the
17 clawback rights do not provide the Commonwealth a property
18 interest, because they are solely for the benefit of the GO
19 debtholders and not the Commonwealth.

20 The Puerto Rico Constitution refutes the monolines'
21 contention. It only allows clawback and retention in respect
22 of available revenues of the Commonwealth. Article VI,
23 Section Two, paragraph three of the Puerto Rico Constitution
24 provides the Secretary of the Treasury may be required to
25 apply the available revenues, including surplus, to payment of

1 interests on public debt. Section Eight provides when
2 available revenues, including surplus, are insufficient, the
3 public debt and amortization thereof shall first be paid.
4 This is paid from available resources of the Commonwealth, and
5 each of these three deals expressly provides a carve-out for
6 that.

7 So it's almost impossible to dispute that the monies
8 they're talking about are not, at least on a contingent
9 reversionary basis, available resources of the Commonwealth.
10 That's the property interest. And here, this is more than
11 speculative or hypothetical. The currently proposed Plan of
12 Adjustment takes that money and uses it to pay the GO
13 debtholders, none of whom are paid in full under the Proposed
14 Plan.

15 Moreover, the revenue -- the revenues come
16 unencumbered, thereby providing the Commonwealth equity in
17 them for purposes of Bankruptcy Code Section 362(d)(2)(A).
18 That's very significant, because there are many arguments here
19 where the movants say, well, even if you have a right, you're
20 under water for purposes of (d)(2)(A). But we have the
21 revenues back lien free, so we have to have equity in them and
22 (d)(2)(A) can't be satisfied.

23 Second, this Court already determined, in the context
24 of the monolines' request and HTA revenues and the reserve
25 account, that HTA had a minimum -- had at a minimum, a

1 contingent reversionary beneficial interest. That was at 582
2 B.L.R., at pages 598 and 599. The Commonwealth's clawback
3 rights provided a reversionary interest as well that was not
4 so contingent given that none of the GO debt would be paid in
5 full under the Proposed Plan of Adjustment.

6 The monolines' claims are also wrong because of the
7 following undisputed facts. The Commonwealth is not party to
8 any security agreement with bondholders. The Commonwealth has
9 disclaimed liability on all the bonds. There is no financing
10 statement filed naming the Commonwealth as a debtor by any of
11 the movants or their bond trustees. There is no agreement
12 under which the Commonwealth transfers equitable ownership or
13 any ownership of the revenue streams to its instrumentalities
14 or to any bondholders or trustees. Bondholders do not have
15 control over any of the Commonwealth's deposit accounts.

16 None of the official statements suggested that the
17 Commonwealth was liable on the bonds, that any of the
18 Commonwealth's funds were pledged to bondholders, that any
19 statutory liens existed, or that any trust in favor of the
20 bondholders had been created. None of the attorneys' opinions
21 mention these rights either. I will address the monolines'
22 reasons why none of the foregoing matters in a few minutes.

23 Third, as we spelled out in our briefs, all
24 pre-PROMESA appropriations are preempted by PROMESA, as we
25 believe this Court and the First Circuit have already held.

1 | Additionally, one legislature cannot bind a future legislature
2 | to make a particular appropriation or not to repeal any tax,
3 | thus, this applies to all three situations.

4 | I will address now the monolines' arguments. First,
5 | in at least their PRIFA and HTA Sur-sur-replies, and now today
6 | in their argument, the monolines cite *Von Hoffman v. Quincy*
7 | and *Missouri v. Jenkins* for the proposition that once a legal
8 | obligation is incurred pursuant to legislative authorization,
9 | the government cannot avoid it by simply failing to
10 | appropriate a disbursement of funds to pay the obligation.

11 | Under well-settled law, reaffirmed by the Supreme
12 | Court they say, if the government says it's a tax and incurs a
13 | debt obligation, but does not perform the ministerial
14 | appropriation, the aggrieved party can sue to mandate the tax
15 | proceeds to be used in accordance with the pledge.

16 | And they describe *Von Hoffman* as follows: "The power
17 | given becomes a trust which the debtor cannot annul and which
18 | the donee is bound to execute." That's -- when I said that
19 | this is their description, it's their quotation from *Von*
20 | *Hoffman*, which ends with a semicolon.

21 | The rest of the sentence that they didn't include has
22 | what Your Honor raised, that the reason for that ruling was
23 | because it would impair contractual obligations. And, Your
24 | Honor, I was a little worried that you stole my thunder, and
25 | you stole part of it. In hindsight, I wish you stole all of

1 it. But I want to go further than the prior colloquy went.

2 One would never expect a litigant to write in its
3 brief that it should lose and its adversary should win, but by
4 citing *Von Hoffman* and cutting off its quotation mid sentence,
5 that is exactly what the monolines have done, albeit
6 unintentional. The portion of the sentence the monolines cut
7 off says that neither the state nor the corporation can any
8 more impair the obligation of the contract in this way than
9 any other.

10 When the Contract Clause has arisen in these Title
11 III cases, it's been creditors asserting that the
12 Commonwealth's moratorium acts and similar acts impaired their
13 contractual obligations. It was never a matter of claiming
14 Title III impaired their contractual obligations.

15 *Von Hoffman* was a case outside bankruptcy, when there
16 was no permanent bankruptcy law, where the Supreme Court was
17 barring the state from impairing a contractual obligation. It
18 was a Contract Clause case having no application in Title III,
19 where the Contract Clause does not apply, or we wouldn't be
20 here.

21 The bottom line is that the monolines haven't cited
22 *Von Hoffman* as their legal authority -- that the monolines
23 haven't cited *Von Hoffman* as their legal authority means they
24 have no authority that is applicable. But the monoline
25 citation of *Von Hoffman* also shows they acknowledge the

1 Commonwealth has the power not to appropriate the rum tax to
2 PRIFA. They cite *Von Hoffman* to say the Commonwealth is
3 barred from exercising that power. *Von Hoffman* would have no
4 application in the monolines' brief if the Commonwealth had no
5 ownership and control of the rum taxes in the first place,
6 because then it wouldn't be able to retain them.

7 The monolines' request for the Court to apply *Von*
8 *Hoffman* and stop the Commonwealth from refusing to appropriate
9 rum taxes to PRIFA is the crux of this dispute and has a clear
10 answer. No one, including the monolines, have asserted the
11 Commonwealth or any debtor cannot breach its promises to pay.
12 Not paying is the essence of bankruptcy.

13 Here the monolines are contending that while the
14 Commonwealth can breach its promises to pay its GO debt and
15 other debt, it cannot breach its promise to appropriate rum
16 taxes to PRIFA. There is no statutory or logical basis for
17 such a distinction.

18 The monolines' HTA Sur-sur-reply Brief also cites
19 *Missouri v. Jenkins*, but that gets them nowhere, simply
20 collects cases consistent with *Von Hoffman*, such as *Louisiana*
21 *v. City of New Orleans*, which the monolines cite, but again,
22 do not disclose as a Contracts Clause case. That Court opined
23 at 215 U.S. 175-6, "a number of decisions in this Court have
24 settled the law to be that where a municipal corporation is
25 authorized to contract and to exercise the power of local

1 | taxation to meet its contractual engagements, this power must
2 | continue until the contract is satisfied." And that, it is an
3 | impairment of an obligation in contract to destroy or lessen
4 | the means by which it can be enforced.

5 | Second, they assert the statutes at issue are not
6 | appropriations. There are many reasons why it doesn't matter,
7 | and in any event, they are wrong. First, as I already
8 | explained above, any obligation to pay money or transfer money
9 | is preempted in bankruptcy. It doesn't have to be an
10 | appropriation obligation.

11 | Bankruptcy impairs all obligations, not just
12 | obligations arising from appropriations. Specifically, Title
13 | III does not make any prepetition obligation nondischargeable,
14 | and that includes appropriation obligations and
15 | nonappropriation obligations.

16 | Second, movants claim the use of the word asignacion,
17 | and I'm sorry if I mispronounced it, and the HTA -- for
18 | revenue statutes is different from an appropriation, but the
19 | English definition of that word is appropriation. Moreover,
20 | their contention that funds and appropriations are not
21 | synonymous is substantively wrong.

22 | They cite to definitions in LPRA -- 3 LPRA 283(b) and
23 | (a), which are not applicable here, but the distinctions there
24 | are distinctions without a difference. Additionally, there is
25 | preemption under Title III, and contrary to what movants

1 argued earlier, there is a big difference between the GO debt
2 and the obligations to appropriate funds to instrumentalities,
3 and the difference is clear and obvious.

4 The difference is that the obligation to transfer
5 money to the instrumentalities is just an obligation, whereas
6 the Puerto Rico Constitution says that the promise to pay the
7 GO debt gets paid first from available resources before anyone
8 else. One is a priority. The other is a garden variety
9 obligation, unsecured obligation. So we don't submit that
10 preemption as to one means preemption as to the other.

11 THE COURT: And you are not pressing your priorities
12 aspect of the preemption arguments in this Lift Stay
13 litigation?

14 MR. BIENENSTOCK: No, I -- well, I'm not addressing
15 all how it would --

16 THE COURT: How it would be --

17 MR. BIENENSTOCK: Right, but what I am saying as to
18 Title III preemption is that the Commonwealth's obligation to
19 transfer money to the three instrumentalities has no greater
20 priority than any other prepetition -- prepetition general
21 unsecured claim. And to say that it does, under some concept
22 of Puerto Rico law that is unidentified, to my knowledge,
23 would be subject to preemption.

24 But the movants haven't even identified any Puerto
25 Rico law that says, hey, look, you have to make these

1 appropriations before you pay your other debts. You know, the
2 GOs have obviously made that argument, because it jumps out of
3 the Puerto Rico Constitution.

4 THE COURT: Thank you.

5 MR. BIENENSTOCK: Now I'm going to turn to PRIFA,
6 although certain principles will be applicable to HTA and
7 CCDA. First, the Board asked the Court not to rely on the
8 monolines' characterizations of what the Board relies on or no
9 longer relies on. The Board rejects the monolines'
10 characterizations of the Board's position.

11 Because Trust Agreement Section 601 provides the
12 PRIFA bonds can only be paid from pledged revenues, two
13 dispositive issues arise immediately: What are they and who
14 owns them? The pledged revenues are defined as the special
15 tax revenues and any other monies that have been deposited to
16 the credit of the Sinking Fund. Movants contend, "Deposited
17 to the credit of the Sinking Fund," only modifies other
18 monies, not the special tax revenues. They are wrong.

19 For now, I'll provide just two reasons. First, that
20 the last clause, "deposited to the credit of the Sinking
21 Fund," modifies both of the prior clauses, which are not
22 separated by a comma, was the First Circuit's ruling in its
23 *ERS* decision at 948 F3d 457. At page 467, the First Circuit
24 wrote, "We start by rejecting the Bondholders' argument, as
25 did the Title III court, that, in the Bond Resolution's

1 definition of Employers' Contributions, the limiting clause
2 'which are payable to the System pursuant to Sections 2-116,
3 3-105, 4-113' modifies only the antecedent phrase 'any assets
4 in lieu thereof or derived thereunder' and not the other
5 antecedent phrase 'the contributions paid from and after the
6 date hereof that are made by the Employers.' The Supreme Court
7 has held that 'when several words are followed by a clause
8 which is applicable as much to the first and other words as to
9 the last, the natural construction of the language demands
10 that the clause be read as applicable to all.'"

11 On the monolines' demonstrative page six, they quote
12 from page i, Roman numeral i, the first page of the official
13 statement that crams a summary of the whole deal into one
14 page. On that page, it separates by a comma the two clauses,
15 so it looks like the rum taxes may not have to be deposited
16 into the Sinking Fund. Nowhere do the monolines mention that
17 page nine of the official statement, which is Exhibit 17 to
18 the movants' PRIFA Stay Motion, provides a detailed disclosure
19 under the bolded heading, security for the bonds.

20 It provides, "Pledged revenues consist of, one, such
21 proceeds of the federal excise tax imposed on the rum and
22 other articles produced in Puerto Rico and sold in the United
23 States that are transferred to the Commonwealth, the federal
24 excise taxes, and deposited to the credit of the Sinking Fund
25 as required by the Enabling Act and the Trust Agreement."

1 Finally, the monolines claim the phrase "deposited in
2 the sinking fund" cannot modify special tax revenues, because
3 the Trust Agreement refers to the deposit to the credit of the
4 Sinking Fund of pledged revenues. So how can deposited funds
5 be deposited again?

6 There are two answers to the monolines' claim.
7 First, the language they found is not operative language in
8 the Trust Agreement. It is language from the back of a form
9 of bond included in the Trust Agreement at pages five and six,
10 which language attempts to summarize the collateral security.

11 Second, the monolines did not solve the problem, what
12 they call their circularity problem, by claiming the deposit
13 language did not apply to special tax revenues. The form of
14 bond does not refer to special tax revenues. It just refers
15 to pledge revenues deposited into the Sinking Fund.

16 So under the monolines' argument, if the deposit
17 requirement only refers to any other monies, the language on
18 the back of the form of bond still creates the issue of
19 depositing pledged revenues, the other monies that are already
20 deposited.

21 Now, who does the Sinking Fund account belong to --

22 The COURT: Mr. Bienenstock, I'm sorry. I'm
23 interrupting you for a moment.

24 MR. BIENENSTOCK: Sure.

25 THE COURT: Before you go on to that next point, what

1 do you do with the argument that if any other monies deposited
2 doesn't modify -- sorry. If it applies to special tax
3 revenues, why mention special tax revenues specifically at
4 all? Why not simply say the pledged revenues are whatever is
5 deposited in that account? It seems to make special tax
6 revenue reference superfluous.

7 MR. BIENENSTOCK: Well, I don't think it's
8 superfluous in the context of the document. The entire
9 document, starting with the Enabling Act, which allocates the
10 special tax revenues to PRIFA, is all about the special tax
11 revenues.

12 So it's totally understandable that someone drafting
13 a document would want to be expressly clear that the
14 collateral includes the special tax revenues, which are the
15 117 million dollars. A little extra clarity doesn't hurt. I
16 know if I were sitting at the drafting section for those bonds
17 that are counting on the 117 million, I would want explicit
18 reference to them and wouldn't be happy if someone said, well,
19 I'll just say any monies we happen to put there.

20 There is an obligation to put the 117 million there,
21 and I want to make that crystal clear and not let anyone
22 argue, well, that 117 million didn't really have to be put
23 there.

24 THE COURT: Thank you.

25 MR. BIENENSTOCK: Now, who does the Sinking Fund

1 account belong to? In their Sur-sur-reply, the monolines mock
2 the concept that they could have a lien and only have a lien
3 against an account owned by the bond trustee. But bear in
4 mind, this is the only pledge in the entire Trust Agreement.
5 That's exactly what they got.

6 The notion that the bond trustee owns the Sinking
7 Fund is a completely false invention, as proven by the Trust
8 Agreement itself. First, movants point to the language in the
9 Trust Agreement, Section 401, providing that the Sinking Fund
10 shall be held by the trustee. Given that a protected security
11 interest in an account requires control, the trustee is
12 holding the account as one of the accepted methods of
13 perfection.

14 Second, movants simply ignore the other language in
15 Trust Agreement Sections 401, 401(a), 401(c), 402, 404 and
16 502. 401 names the Sinking Fund, but -- Puerto Rico
17 Infrastructure Financing Authority Special Tax Revenue Bonds
18 Sinking Fund. It certainly sounds like it belongs to the
19 Authority, not the trustee.

20 401(a) requires PRIFA to withdraw money from the
21 Infrastructure Fund and deposit it into the bond service
22 account, which is one of the subaccounts for the Sinking Fund,
23 in the amount of principal and interest to become due during
24 the year. If the Trustee owns it, you wouldn't deposit the
25 money early.

1 401(c), PRIFA can deposit it into the reserve account
2 in substitution of monies, a letter of credit or insurance
3 policy. This cannot possibly belong to the trustee as it is a
4 reserve account that may never be needed.

5 402 instructs the trustee when he can withdraw money
6 and what he can withdraw from the bond service account. If
7 the trustee owned it, he would not need permission or
8 instructions on when to access it.

9 404 requires the trustee to allow PRIFA to withdraw
10 money from the reserve account when there is excess funding.
11 It can't belong to the trustee if PRIFA is entitled to it.

12 And 502 requires that investment earnings of the
13 Sinking Fund be paid to the Puerto Rico Infrastructure Fund
14 when there is excess money. If the trustee owned it, he would
15 get the earnings.

16 Third, UCC Section 9-607(a)(4) provides, funds
17 credited to a deposit account that is collateral do not become
18 property of the secured party until applied. 9-617(a)(2)
19 provides, a deposit account or -- applies to secured debt only
20 on collection.

21 Now, the Lockbox Agreement. Just a few facts to show
22 it does not help movants. Neither PRIFA, nor the bondholders,
23 nor the PRIFA bond trustee are parties. It protects the rum
24 producers like the party. The existence of the Lockbox
25 Agreement shows exactly how the bondholders should have

1 | protected themselves if they wanted a security interest in the
2 | excise taxes at the Commonwealth level. Section 24 provides
3 | for no third-party beneficiaries.

4 | The next to last whereas clause recites, the parties
5 | are entering into a deposit account control agreement to
6 | perfect a security interest in cash. That is exactly what the
7 | PRIFA bond trustee did not do at the Commonwealth level.

8 | I just have a few arguments in the context of PRIFA
9 | about movants used of their expert report and financial
10 | statements. There are basically three reasons why we submit
11 | they have no materiality or relevance.

12 | First, let's take a look at the government parties'
13 | PREPA demonstrative. There's just one, Your Honor. There are
14 | two, but one is the statute, so I'm referring to the first,
15 | which is the one-page diagram.

16 | THE COURT: Okay. 329 --

17 | MR. BIENENSTOCK: The flow of funds -- yeah.

18 | THE COURT: Okay. And it's in Exhibit A of that?

19 | MR. BIENENSTOCK: Right.

20 | THE COURT: Okay.

21 | MR. BIENENSTOCK: The flow of funds shows the money
22 | starting with the federal government, and then going to the
23 | Commonwealth, which then deposits it in the lockbox. And then
24 | the lockbox, Bank City, transfers 117 million to the
25 | Commonwealth TSA account. And then it goes into the

1 | Infrastructure Fund, which according to movants' expert, may
2 | be located in one or more bank accounts. For present
3 | purposes, it won't matter.

4 | Movants' expert report doesn't help resolve the
5 | issues here. As we explained in the government's Sur-reply,
6 | the expert defined "fund" as a concept to keep track of
7 | certain revenues, regardless of whether they were in one or
8 | more accounts. And he defined "restricted" as meaning a debt
9 | covenant to governmental purpose that would require use of the
10 | money for a particular objective.

11 | No one here, including the Court, needs to see the
12 | word "restricted" to know what the PRIFA documents say the
13 | money should be used for. That's not the question. That's
14 | not even disputed. The issue is whether, under Title III, the
15 | documents and statutory obligations can or must be breached --
16 | or the contractual and statutory obligations can or must be
17 | breached or specifically enforced. Accounting doesn't answer
18 | that question.

19 | Finally, movants' expert looked at balance sheets for
20 | the Commonwealth for the dates, how much it was paying its
21 | debts, and made various observations. The point I want to
22 | make is that the balance sheets can only be based on account
23 | balances either at the lockbox, the TSA, the Infrastructure
24 | Fund or the Sinking Fund.

25 | Let's look at the top of the exhibit of the

1 demonstrative. The balance sheet doesn't request cash the
2 Federal Government is about to send the Commonwealth, nor does
3 it reflect a check from the Federal Government being held by a
4 Commonwealth employee deciding where to deposit it. Or if
5 they use wires, the balance sheet doesn't reflect instructions
6 Commonwealth employees could give the Federal Government, the
7 lockbox bank, or the TSA, as to where to send the money.

8 The expert only sees where they sent it. That's the
9 only thing the balance sheet reflects, and whether they marked
10 it restricted. That doesn't help solve the legal issues here,
11 namely, whether the Commonwealth could instruct each bank not
12 to transfer the money to the Infrastructure Fund accounts,
13 which is what has been happening or not happening the last
14 three years.

15 Put differently, the balance sheets only show what
16 restrictions the Commonwealth wanted to impose or comply with.
17 And the ones looked at were during the good times when they
18 were paying all their debts. They don't show what the
19 Commonwealth's options were.

20 Now, on the Infrastructure Funds --

21 THE COURT: Before you go on, may I just explain that
22 I gave the wrong document reference. I was looking at 13343,
23 the government's demonstrative on those funds. Please go
24 ahead.

25 MR. BIENENSTOCK: Thank you, Your Honor.

1 The Infrastructure Funds. First, it's important not
2 to overlook the obvious, namely, that the Enabling Act
3 authorizes and the Trust Agreement determines which
4 authorizations to use. So while 3 LPRA 1914 provides, the
5 Puerto Rico Infrastructure Fund shall be maintained by
6 quote -- shall be "maintained by or on behalf of the
7 Authorities," the Trust Agreement Section 401 provides, "The
8 Authority shall maintain, with a qualified depository, the
9 Puerto Rico Infrastructure Fund." Movants' contention that
10 the Infrastructure Fund is at the Commonwealth is simply
11 contrary to Section 401.

12 Additionally, and as a response to some of this
13 morning's argument, all of this discovery, and looking for
14 where the accounts are and what they need in them, you'll
15 either find that the Commonwealth complied with the document
16 or did not comply with the document. But who cares? They --
17 the document gives the parties their rights. And if they
18 didn't comply, then someone might have a claim for not
19 complying. But it has nothing to do with whether -- with what
20 property interest the moving parties have.

21 3 LPRA 1914 also provides that the excise taxes
22 covered into the Infrastructure Fund "shall be used by the
23 Authority for its corporate purposes." Thus, the monolines'
24 whole story about the Infrastructure Fund being at the
25 Commonwealth and subject to their lien or equitable ownership

1 makes no sense. It is totally at odds with the open-ended
2 corporate purposes that the Authority can use the money for.

3 Additionally, movants claim that rum excise taxes
4 belong to PRIFA, and are held in the TSA, and they have a lien
5 against them. This is additionally disproved by 3 LPRA 1918,
6 which requires that, "all moneys of the Authority shall be
7 deposited in depositories qualified to receive funds of the
8 Commonwealth, but they shall be kept in a separate account or
9 accounts in the name of the Authority." Thus, PRIFA's money
10 cannot be held in the TSA.

11 The word "participation" in 3 LPRA 1914 logically
12 refers to the share of Rum Taxes to be covered into the
13 Infrastructure Fund. There's no reason it means "ownership".

14 3 LPRA 1913 shows the Commonwealth can terminate its
15 annual appropriations to PRIFA, otherwise, it would not have
16 needed to covenant not to terminate the appropriations.

17 Mr. Ahlberg's testimony that he understood the
18 Infrastructure Fund to refer to the first 117 million of rum
19 revenues earned is both understandable and totally irrelevant
20 and immaterial. It's understandable, because in the years
21 Puerto Rico was paying all its debts, it was expected that
22 Puerto Rico would comply with the Trust Agreement and transfer
23 the rum tax proceeds to the Infrastructure Fund as required by
24 3 LPRA 1914. It's immaterial, because it does not address any
25 of the legal issues, such as whether the rum taxes became

1 subject to a security interest before being deposited in the
2 Sinking Fund.

3 This testimony is only being hyped by movants because
4 they created a fallacious theory that somehow the rum taxes
5 became subject to the bondholders' lien immediately on the
6 Commonwealth's receipt of them, and to shore that up, the
7 monolines claim PRIFA becomes their equitable owner
8 immediately because they say the Commonwealth holds the
9 Infrastructure Funds. And since the taxes do not have to be
10 deposited in the Sinking Fund, according to them, the security
11 interest arises as soon as PRIFA gets them.

12 None of that story is borne out by the deal
13 documents, the Trust Agreement. When we pointed out that the
14 Trust Agreement, Section 401, provides, "The Authority shall
15 not pledge or create any liens upon any monies in the Puerto
16 Rico Infrastructure Fund," movants responded, it must mean no
17 liens except for that lien. Suffice it to say, that's not
18 what Section 401 says. That's something they just made up.

19 Finally, no language in the Enabling Act or Trust
20 Agreement creates a trust in the Infrastructure Fund.
21 Moreover, because that fund is for PRIFA's corporate purposes,
22 movants lack standing to assert the Infrastructure Fund money
23 is in trust. Only PRIFA would have that standing.

24 For a moment, I just want to review the legal
25 determinations movants are asking for, or the hoops they are

1 hoping the Court will jump through. First, that the
2 Commonwealth statutory agreement not to alter PRIFA's rights
3 somehow transferred equitable ownership of the rum revenues to
4 PRIFA. Second, that the Infrastructure Fund the Trust
5 Agreement requires to be maintained by PRIFA is actually
6 maintained by the Commonwealth. That the Trust Agreement's
7 bar against liens against the Infrastructure Funds does not
8 bar PRIFA from granting movants a lien, or from movants having
9 a lien. And the definition of Pledged Revenues restricting
10 them to Special Tax Revenues deposited in the Sinking Fund
11 doesn't really mean that.

12 Now to HTA. Ms. McKeen will cover most all the
13 issues relating to the disputes over the accounts, but as
14 shown by the government parties' HTA demonstrative, other than
15 the tolls collected by HTA, all the taxes and other revenues
16 movants want originate at the Commonwealth and flow down to
17 HTA when the Commonwealth appropriates them to HTA.

18 To be sure, they argue that in prior pre-PROMESA
19 years, the appropriation was done by HTA. And that's
20 perfectly logical since when the Commonwealth was paying all
21 its debts, what is sometimes referred to as a standing
22 appropriation in the statutes to send down the license fees
23 and guest taxes, it's taken for granted that it will happen
24 each year to pay the debts.

25 And it was totally within the Commonwealth and HTA's

1 powers to put it into HTA's budget. It doesn't mean that we
2 should use that voluntary decision as evidence to change what
3 the documents say. But the main issues are preemption of
4 pre-PROMESA appropriation, whether one legislature can bind
5 today's legislature, which is deemed to approve Oversight
6 Board budgets, both of which are covered.

7 And the last issue, whether movants have succeeded in
8 proving a security interest in HTA's purported rights to
9 appropriations, if the appropriations are not preempted and
10 given rise to a claim, as I will show, movants only have
11 security interest in the Sinking Fund. First, Section 601 of
12 the 1968 and '98 resolutions provides the revenues and funds
13 are pledged to the extent herein above particularly specified.
14 Movants omit that qualification from their Reply in paragraphs
15 33 to 39.

16 Section 401 is the only grant of a security interest
17 in the resolutions, and it grants security interest only to
18 the extent funds are deposited in the Sinking Fund that is
19 herein above specified.

20 Movants claim to have a perfected security interest
21 in HTA's rights to monies from the Commonwealth. In fact,
22 they only have security interest in monies received by HTA,
23 but they are not perfected for many reasons.

24 Your Honor, may I ask how long I have?

25 THE COURT: Ms. Selden.

1 MS. SELDEN: About 12 minutes.

2 MR. BIENENSTOCK: Okay. Thank you. Thank you.

3 THE COURT: Mr. Bienenstock, would you make sure to
4 touch on the position as to ownership or security interest in
5 excise tax monies that have reached HTA?

6 MR. BIENENSTOCK: Yes. To the extent whatever --
7 whatever taxes or other revenues are in the Sinking Fund are
8 subject to their security interest.

9 THE COURT: But only what is actually in the Sinking
10 Fund?

11 MR. BIENENSTOCK: Right. Now, that doesn't --
12 right. That's right.

13 THE COURT: Thank you.

14 MR. BIENENSTOCK: In regards to perfection, no
15 section of either the 1998 resolution or the 2002 Security
16 Agreement grants a security interest in HTA's receivables or
17 any right of HTA to receive revenues. The security interests
18 are limited to monies already received by HTA.

19 Even on the expansive view of the security interest
20 granted by the 1998 resolution, it grants only security
21 interest in revenues "received" by HTA. That's a 1998
22 resolution, Sections 101, 401, and 601.

23 Similarly, the 2002 Security Agreement grants a
24 security interest in the '98 resolution funds, which are
25 deposit accounts, and amounts that are required to be on

1 deposit in them by the terms of the 1998 resolution. The only
2 monies the 1998 resolution requires to be on deposit are the
3 1998 resolution funds or revenues that have been received by
4 HTA. Received funds are, of course, put into and held in a
5 deposit account.

6 As a result and as discussed, or as I will discuss,
7 movants' security interests are best characterized as security
8 interests in deposit accounts under Article Nine of the
9 Uniform Commercial Code. Movants claim a security interest in
10 deposit accounts are perfected because when the security
11 interests were granted, Article Nine of the UCC did not cover
12 deposit accounts, and when revised, Article Nine came into
13 force, it provided continuing validity.

14 Movants are wrong. I'm going to abbreviate what I
15 plan to say for lack of time, but suffice it to say, movants
16 have cited the wrong statute. They cite the transition rules
17 in Article Nine for the attachment of the security interest.
18 They cite 19 LPRA 2402(b), but the correct citations is 19
19 LPRA 2403(b).

20 And the bottom line to that is whatever happened pre
21 the revision of Article Nine, it would have to be fixed within
22 three years. Three years long ago expired, in about 2015, and
23 it wasn't fixed.

24 To avoid this conclusion, movants try to assert their
25 security interest is in accounts, which are not to be confused

1 with deposit accounts, for payment intangibles. This is
2 wrong. Article Nine defines accounts as a right to payments
3 of a monetary obligation, and a payment intangible is a
4 general intangible under which the account debtor's principal
5 obligation is a monetary obligation.

6 A security interest in amounts or monies in deposit
7 accounts is a security interest in a deposit account.
8 Movants' security interests are in the 1998 resolution funds,
9 and at the most, on all amounts received by HTA. To qualify
10 as security interests in payment intangibles or accounts,
11 movants' security interest must extend to HTA's right to
12 payment. But even on movants' expansive view, none of the HTA
13 bond resolutions grant movants a security interest to any
14 rights to payment of revenues. They only grant a security
15 interest in monies actually received by HTA into HTA's
16 accounts. Movants have not seemingly alleged otherwise.

17 As a result, it is a security interest on deposit
18 accounts that can only be perfected by control, which does not
19 exist. Which does not exist.

20 Your Honor, as much as I would like to cover the HTA
21 slides and --

22 COURT REPORTER: I'm sorry. Could the person
23 speaking identify themselves?

24 THE COURT: Yes. Who is speaking now?

25 Mr. Bienenstock was speaking. Who just spoke? Hello? Would

1 | someone who can hear me say that they can hear me?

2 | MS. NG: Judge, can you hear me?

3 | THE COURT: Yes, I hear Lisa.

4 | MS. NG: Okay.

5 | THE COURT: Okay. Mr. Bienenstock, can you hear me?

6 | MR. BIENENSTOCK: Yes, I can, Your Honor.

7 | THE COURT: Okay. Was that a different person
8 | speaking or was that -- he said, as much as I would like to
9 | something. Was that you?

10 | MR. BIENENSTOCK: No, that was not me.

11 | THE COURT: Okay.

12 | MR. BIENENSTOCK: I said, as much as I would like to
13 | go on with HTA, I wanted -- and the slides, I was going to say
14 | I want to get some of the comments made earlier in the
15 | argument. And Ms. McKeen is going to cover the dispute over
16 | the CCDA transfer account.

17 | THE COURT: Okay. Was that Mr. Bienenstock?

18 | MR. BIENENSTOCK: Pardon me?

19 | THE COURT: Is that Mr. Bienenstock who just said
20 | that?

21 | MR. BIENENSTOCK: Yes.

22 | THE COURT: For some reason, voices are sounding
23 | different to me.

24 | MR. BIENENSTOCK: Yes. This is Martin Bienenstock.

25 | THE COURT: Okay. I'm so sorry. For some reason,

1 the sound quality changed, so I was confused.

2 So we'll put you another minute and a half on the
3 clock to cover my confusion.

4 MR. BIENENSTOCK: Thanks, Judge.

5 I want to go back to cover a few comments made
6 earlier, but I will say, as far as CCDA, and again, HTA, we
7 believe the preemption issues and the inquiries here, they --
8 there is no obligation, other than an unsecured prepetition
9 obligation to transfer any of these monies to any of these
10 three entities, and as a result -- and that none of the
11 documents give them a security interest at the Commonwealth
12 level. So we think that ends the matter.

13 And whether CCDA's transfer account is one number or
14 the other has no materiality or relevance to the Stay Motion.
15 I think that's clear, but I just wanted to put it on the
16 record as our position.

17 Contrary to the argument that there's some type of
18 trust in HTA, based on the *Flores Galarza* case, we think it
19 was totally different. It was motorists sending their own
20 money into the government, which was duplicative of insurance
21 premiums they had paid for private insurance, with their own
22 money being returned to them. And so the government was
23 holding their money for them. And the statute contemplated
24 that people would pay duplicative premiums, and the duplicates
25 would have to be returned.

1 The notion that preemption is not ripe -- we think
2 that preemption is key, key to this for the reasons that I've
3 already mentioned.

4 THE COURT: Mr. Bienenstock, are you still there?

5 MR. BIENENSTOCK: Yes. I'm sorry. I was looking at
6 my notes. It wasn't that you lost the sound.

7 THE COURT: Yesterday I got cut off, so I'm just
8 checking.

9 MR. BIENENSTOCK: I wanted to address some of the DRA
10 issues. As I explained earlier, whether the obligation to
11 transfer taxes that the DRAs are concerned about fit within
12 the definition of appropriations or not, as I explained
13 earlier, has no consequence here. Any obligation to transfer
14 is preempted by PROMESA.

15 Otherwise, as I said at the very outset, these claims
16 would become equivalent to specifically enforceable
17 nondischargeable claims. And to make them that way, I
18 think -- none of the moving parties would dare say to Your
19 Honor, I'd like Your Honor to determine that my claim is
20 specifically enforceable and nondischargeable, because the
21 statute doesn't come close to doing that.

22 So instead, they have said, well, tell me I've got
23 equitable ownership. Tell me I've got a trust. Tell me I've
24 got something that takes it outside of the property of the
25 Commonwealth.

1 And Your Honor, this is reminiscent of equitable
2 remedies outside of bankruptcy. When you don't have
3 bankruptcy and debts can be paid in full, courts frequently
4 come up with equitable remedies. But those equitable remedies
5 are frowned on and virtually banned and preempted in
6 bankruptcy because their only effect is to spring one
7 unsecured claimholder ahead of another.

8 It's true that the Commonwealth has breached its
9 obligations to its creditors. It's not a good thing. It's a
10 bad thing. But for one group of creditors to say, well, give
11 me a special remedy, I have a transfer obligation, you only
12 have a promise to pay, makes no logical sense.

13 And I think on that, Your Honor, I'll stop, subject
14 to Your Honor's questions.

15 THE COURT: Thank you, Mr. Bienenstock. Let me just
16 take a minute to -- so as to standing, do you dispute that
17 movants have standing to bring their motion with respect to
18 toll revenues and any other monies that have hit HTA but are
19 not necessarily in the Sinking Fund?

20 I'm asking about standing, not about whether you
21 think there's a security interest, whether you think they'll
22 win on the security interest.

23 MR. BIENENSTOCK: Right. Your Honor, we're not --
24 we're not attacking standing for purposes of making the stay
25 relief motions. That's actually where this started

1 approximately a year ago, with the PRIFA rum tax stay relief
2 motion.

3 THE COURT: Yes.

4 MR. BIENENSTOCK: We're not making that type of
5 attack on standing. Our standing objections today are to the
6 extent that movants have claimed that they have a trust, a
7 beneficial trust interest in monies that, outside of
8 bankruptcy, were supposed to be transferred to the three
9 entities, we're saying that it's those three entities.

10 Now, we do acknowledge that the -- in each of these
11 three instances, there's a statute on the books where the
12 Commonwealth committed that it would not alter or impair the
13 rights of these three entities while the relevant bonds were
14 outstanding. So I think for purposes of making claims based
15 on that statute, the bondholders would be included as having
16 standing, because the statute was addressed to them as much as
17 to the three instrumentalities.

18 But for purposes of stay relief, based on having a
19 secured interest or some other property interest, whether a
20 trust or whatever, we don't think they have standing for that
21 based on the statutes.

22 THE COURT: So whereas to matters in which you might
23 concede, there's a more -- I'm not even going to get into the
24 word "colorable", so -- and I'm not going to try to summarize
25 because the hour is late, but I do think I follow what you

1 said. So I thank you for that.

2 And let me just take one more minute to look at my
3 notes. Let's see. You said that as to the cash flow, that
4 includes the transfer account and the surplus account, so I
5 think that that is CCDA, that it doesn't matter which account
6 is the transfer account. If that is what you said, I'd be
7 grateful if you'd explain that a bit further, because my
8 impressions have been that the identity of the transfer
9 account was a material issue, because the Oversight Board is
10 contending that it's an account that is not funded and the
11 movants are contending that it is an account through which all
12 money goes.

13 MR. BIENENSTOCK: Right. I think -- I hope I said it
14 in the context -- in the context of it doesn't -- it doesn't
15 matter in terms of whether preemption allows the Commonwealth
16 to cease all transfers of these taxes. And I didn't say it
17 earlier, but I should have, that, you know, we don't believe
18 that the taxes belong to the Tourism Company. They were made
19 effectively a collection agent. In fact, you might even say
20 that the Commonwealth hadn't been doing a good job at it, so
21 they became the collection agent.

22 The taxes still are Commonwealth taxes, but as to
23 which account they're in, we know the moving party's looking
24 for the account into which money is being -- money is being
25 deposited, because they have a lien on the transfer account.

1 If it's -- well, they have a lien on the actual transfer
2 account, not the one they've designated as the transfer
3 account.

4 We can -- you know, we can reroute the money. It's
5 in that sense I said it doesn't matter. But I suppose for
6 purposes of determining the amount of their lien at any given
7 time, it would matter which one it is, because they have a --
8 they don't have a lien on all the accounts. They only have it
9 on the transfer account.

10 THE COURT: Thank you for that clarification.

11 And so it is now 12:42. We will break for lunch and
12 resume at 2:15 with Ms. McKeen's argument. And then we will
13 continue through the remaining arguments.

14 Thank you very much for the arguments thus far this
15 morning, and for all of the thousands of pages of submissions
16 in advance of the hearing. And you can see that I have spent
17 a great deal of time on them.

18 So have a good lunch, and dial back in at 2:15,
19 please. Thank you. Be well, everyone.

20 MR. BIENENSTOCK: Thank you.

21 (At 12:43 PM, recess taken.)

22 (At 2:19 PM, proceedings reconvened.)

23 THE COURT: Good afternoon. This is Judge Swain.

24 MS. NG: Hi, Judge.

25 THE COURT: Ms. Ng, are you there?

1 MS. NG: Yes, Judge. I'm here.

2 THE COURT: Hi there. Are we all ready to proceed?

3 MS. NG: Yes, we are.

4 THE COURT: Very well. Again, good afternoon.

5 Buenas tardes to everyone.

6 I believe the next person up to speak is Ms. McKeen
7 for AAFAF for 15 minutes.

8 MS. MCKEEN: Thank you, Your Honor. Good afternoon.
9 Elizabeth McKeen of O'Melveny & Myers for AAFAF.

10 Before I begin, I want to quickly address what
11 Ms. Miller said about AAFAF's preemption position. Ms. Miller
12 said we -- that AAFAF vehemently disagrees with the Board's
13 preemption argument, and that's just not right. We agree
14 Title III has preemptive parts. We did not join the other
15 preemption argument made by the Board because, as the Court
16 knows, we've had historical disagreements with the Board
17 regarding the breadth of its powers under PROMESA, and we
18 simply don't think the Court needs to reach these issues to
19 deny these motions in their entirety. I think calling it
20 vehement disagreement is unfounded.

21 There are two distinct issues here that have to be
22 disaggregated, even though the monolines repeatedly conflate
23 them in their brief and in their argument. Those issues are
24 who owns the revenue, on the one hand, and then on the other
25 hand, what liens exist in favor of the bondholders.

1 As for the latter, putting aside perfection issues,
2 the bondholders clearly have liens on specific accounts at
3 each entity. Those are very specific. They can be discerned
4 plainly from the face of the docket. But as the briefs and as
5 Mr. Bienenstock explained, that's all they have. And the
6 clarity of those liens stands in sharp contrast with
7 everything else they claim from a sort of muddled set of
8 doctrines and incorrect factual contention.

9 As for who owns the revenues, we think the touchstone
10 of that analysis has to be statutes themselves. Those
11 statutes gave an expectancy interest, but they did not
12 transfer the Commonwealth's ownership interest to the
13 bondholders.

14 First, the bondholders' liens from the
15 instrumentalities are themselves fundamentally inconsistent
16 with the idea that the bondholders also own the Commonwealth's
17 revenues, as they tried to argue. This Court's recognized
18 that already. It's recognized the contention that funds that
19 are subject to a lien are spatially incompatible with full
20 ownership of the funds. That was in the *Assured-HTA* case, 582
21 B.R. 579, at 598.

22 Second, contrary to what Mr. Ellenberg argued, when
23 the Commonwealth legislature intends to transfer ownership of
24 public funds, the language of the statute is unmistakable on
25 that point. And I think COFINA is instructive, as this Court

1 recognized in its colloquy with Mr. Ellenberg.

2 The post restructuring COFINA statute contains a
3 provision entitled, ownership of the COFINA revenues. It
4 states that transfer of the COFINA revenues was, quote, An
5 absolute transfer of all legal and equitable right, title and
6 interest, and not a pledge or other financing. And it goes on
7 to say that COFINA, quote, Is and will be the sole and
8 exclusive owner of the COFINA revenues. And that those
9 revenues don't constitute available resources under Section
10 Eight, or Article VI of the Constitution.

11 Now, that's not a new --

12 THE COURT: I'm sorry. What I want to say is that
13 the new COFINA statute was drafted in the light of Title III
14 and substantial litigation of all these issues. Is there any
15 statutory language or means, short of that sort of very
16 specific lengthy language that's in the new COFINA statute,
17 that you would recognize as dedicating a stream of tax
18 revenues securing repayment of bonds in a way that couldn't be
19 undone by subsequent legislation or a certified budget?

20 MS. MCKEEN: That's a good question, and I think the
21 prior COFINA statute that the Board cited in its papers also
22 goes a lot farther than the statutes that we have here. I
23 think what's clear is that the statutes here don't even come
24 close to where they would need to be to get the monolines to
25 the promised land.

1 They use language like, shall pay, shall transfer,
2 shall be covered into, shall be deposited; and that kind of
3 language creates nothing more than an expectancy. It doesn't
4 create property rights, much less in favor of the bondholders.
5 And that's why I think you heard Mr. Ellenberg and Ms. Miller
6 speak a lot about intent, and that's because the statutes just
7 don't say what they want them to say.

8 And Mr. Ellenberg also argued --

9 THE COURT: You --

10 MS. MCKEEN: Go ahead. I'm sorry.

11 THE COURT: I'm sorry. The first COFINA statute I
12 think also postdated these other statutes, and so, you know,
13 to get into a little bit of mind reading, but I'd like to know
14 what your position is, would your position be that the COFINA
15 provision for transfer was a decision by the Commonwealth to
16 change its practice, or is there some way short of the
17 specific use of the word "transfer" that the Commonwealth
18 could alienate its interest in the stream of revenue if it
19 intended to do that?

20 MS. MCKEEN: I think there certainly could be, but we
21 don't need to guess at that here, because the language of the
22 statutes that we have in front of us don't even come close. I
23 think it's a good question, and it's hard for me to speculate
24 about where that line gets crossed, but it's not crossed here.
25 They don't even come close to it here.

1 THE COURT: Thank you.

2 MS. MCKEEN: With respect to the statutory language,
3 Mr. Ellenberg argues that it's the law, but as Mr. Bienenstock
4 explained, that argument is entirely inconsistent with Chapter
5 Nine, which relieves the debtor of all manner of financial
6 obligations, including those that arise by statute.

7 The Commonwealth itself made no pledge to the
8 bondholders at all, and because the language of the statutes
9 don't -- it doesn't give the movants the right they claim,
10 they ask this Court to go on and infer property rights that
11 don't otherwise exist based on a host of different things.
12 One of the things they think gets them to where they need to
13 be is this characterizing what they call a course of
14 performance, that they say confirms their reading of the law.
15 But course of performance isn't relevant to statutory
16 interpretation for a good reason.

17 Whatever accountants say or whatever Treasury
18 employees do to facilitate the Commonwealth's state of their
19 cash management can't create property rights that don't
20 otherwise exist against public funds. That's kind of a
21 fundamental point. If the movants didn't get the rights to
22 hundreds of millions of dollars pursuant to these statutes, it
23 doesn't make sense to think that they somehow got those rights
24 because of how the Commonwealth engaged in accounting.

25 But the monolines also ignore facts that either

1 undercut or downright disprove their argument. For example,
2 with respect to the Commonwealth collection of excise taxes
3 and rum taxes, there's no question that in the first instance,
4 the Commonwealth takes its funds and puts them into its own
5 account.

6 The movants rely on language about special deposit
7 funds in a Commonwealth financial statement to argue that
8 maybe the Commonwealth holds these funds only as a trustee or
9 as a collection agent, but when the Commonwealth holds funds
10 as a custodian for another entity, the financial statements
11 make that very clear with disclosures. And as the Oversight
12 Board explained in its Sur-reply brief, nothing in the
13 financial statement suggested that the excise taxes were the
14 wrong taxes, were in a special deposit fund. There's no
15 mention of HTA or PRIFA funds whatsoever in that context.

16 So that tells you what you need to know on the point
17 about course of dealing. The Commonwealth wasn't or didn't
18 consider itself a fiduciary or a collection agent for any
19 funds at issue in this case.

20 And I think *Flores Galarza* sort of makes the point
21 all the more clear, because in that case, you had a statute
22 that was very clear about the Commonwealth being a collection
23 agent. And in fact, you had a situation where the
24 Commonwealth was given a fee for conducting collections. And
25 so the combination of the financial statement and the

1 monolines' characterization of *Flores Galarza* show you that
2 they're asking the Court to make these huge inferences, when
3 the reality is the Commonwealth knows very well how to express
4 all these points when it wants to.

5 Now, to conclude, I'd like to address some of the
6 instrumentality specific arguments that the monolines make,
7 because I think they are based on either misinterpretation or
8 sometimes just plain mischaracterization of the facts. And I
9 think it's important to talk about some of these with some
10 specificity.

11 With respect to HTA, contrary to their arguments, the
12 existence of Fund 278 doesn't show that these excise taxes are
13 held in trust. Some codes do not define or relate to property
14 rights. They are a mechanism within Treasury's accounting
15 system used to classify funds upon receipts.

16 Putting aside that a fund code isn't a bank account
17 and it's not used to segregate money, the fund code 278 isn't
18 even exclusive to HTA. There are revenues tagged from 278
19 that were never allocated to HTA. As one example, before the
20 Lockbox Agreement was executed, rum tax proceeds paid to rum
21 producers were classified with the Fund 278 code, which you
22 can see right on page 15 of the demonstrative that Ms. Miller
23 referred to with respect to PRIFA.

24 There is highlighted text there referring to Fund
25 278, even though it's with respect to a payment being made to

1 rum purchasers. So it can't be that designated money -- the
2 fund code 278 makes that money HTA, or makes that money
3 bondholder property, when there's clearly fund code 278
4 designated monies that are not HTA's property.

5 The monolines' expert, Mr. Holder, claims that
6 classifying excise taxes with that fund code conveyed that the
7 revenue is restricted, but he cites no evidence whatsoever to
8 support that assumption. And in fact, right after saying that
9 Treasury use of code fund 278 must convey a debt service
10 restriction with respect to HTA, he turns around and draws the
11 exact opposite conclusion in his discussion of PRIFA, saying
12 that the accounts used in systems like PRIFA are, quote,
13 Helpful for tracking funds subject to particular restrictions,
14 but are not in and of themselves ultimately determinative of
15 which money they're held with special funds or otherwise
16 subject to restriction.

17 The monolines --

18 THE COURT: I'm sorry. Since we're on PRIFA for a
19 moment, can you tell me what the PRIFA Infrastructure Fund is
20 and where it's located? Who maintains it?

21 MS. MCKEEN: Yes, Your Honor. So the PRIFA
22 Infrastructure Fund -- and if you'll allow me to just check my
23 notes, I want to make sure that I get this right. Under the
24 terms of the Enabling Act, the Infrastructure Fund is a
25 special fund to be maintained by or on behalf of PRIFA, and to

1 be used by PRIFA for its corporate purposes.

2 The Enabling Act also allowed PRIFA to segregate the
3 funds into one or more subaccounts. As the Commonwealth and
4 PRIFA's 30(b)(6) witness testified, there was no bank account
5 or accounting designation that was understood to be the
6 Infrastructure Fund. It was the understanding of Commonwealth
7 personnel that the Infrastructure Fund referred to the first
8 117 million dollars of rum tax revenue.

9 So when you read the statute and compare it to the
10 predefault funds, the most logical conclusion is that the
11 Infrastructure Fund existed across two accounts into which the
12 Commonwealth transferred the first 117 million dollars of rum
13 taxes; the 113 million dollars of PRIFA debt service that was
14 in an account that GDB administered; and the four million
15 dollars that went to a PRIFA general account for PRIFA's
16 operational purposes.

17 What I would also say about that, as long as we're
18 talking about PRIFA, is that while movants argue that the
19 Infrastructure Fund is part of the TSA, and it attempts to
20 kind of expand their rights to reach Commonwealth accounts,
21 they -- in doing so, I think they ignore Section 1914 of the
22 Enabling Act, which expressly contemplates the Infrastructure
23 Fund can be segregated into one or more subaccounts, because
24 that's precisely what was done here.

25 THE COURT: And is it your position that those

1 accounts have not been funded since the cessation of payments
2 on the bonds?

3 MS. MCKEEN: That's correct, Your Honor.

4 THE COURT: Thank you.

5 MS. MCKEEN: The last thing I want to address is
6 quickly, with respect to CCDA, the transfer account is empty.
7 The movants are struggling to define a different account to be
8 the transfer account. And their argument, which is entirely
9 made up, is not only inconsistent with the flow of funds that
10 the documents dictate, it's also inconsistent with what
11 actually happened.

12 When they start from the premise that the initial
13 collection account, the Scotiabank 5142 account is the
14 transfer account, it means they're forced to argue that the
15 actual transfer account, which is GDB-9758, must be the
16 surplus account; and they double-down on that argument,
17 because some account materials associated with the transfer
18 account use the word "surplus" in the account name. But
19 there's no question that that account functioned as the
20 transfer account.

21 GDB-9758 is the only account in the flow of funds
22 that ever funded the pledge account, which channeled funds for
23 that service. That's how you know it's the transfer account.
24 And similarly, you know that Scotiabank 5144 is a surplus
25 account, because it received the surplus funds. And that's

1 not what happened with GDB-9758, which received all of the
2 funds.

3 So, to conclude, we believe that -- yes, Your Honor.

4 THE COURT: Give me your conclusion, and then I'll
5 ask you my follow-up question.

6 MS. MCKEEN: Okay. We think the inconsistencies and
7 the movants' submissions in support of the HTA and PRIFA
8 motions make the shortcomings of their argument clear. With
9 respect to HTA, they argue that the lack of an annual budget
10 appropriation means they have an ownership interest, but when
11 the rum taxes are subject to a budget appropriation, they say
12 it doesn't matter.

13 With HTA, they say fund codes show an ownership
14 interest. With respect to PRIFA, they say it doesn't matter.
15 And that's because their argument really boils down to no
16 matter what the facts are, we should win. Their positions
17 aren't based on any consistent or coherent set of principles,
18 because they're hunting and pecking for something to hang
19 their hats on, because the statutes didn't say what they want.

20 Mr. Ellenberg's mouse trap is empty. The
21 Commonwealth knows how to grant property interest when it
22 wants to, and that's not what it did here.

23 Thank you, Your Honor.

24 THE COURT: Thank you.

25 Now, going back to CCDA, are the movants wrong when

1 they argue that factual disputes over which account is the
2 transfer account should be determined in the context of their
3 proposed CCDA enforcement action as opposed to the Lift Stay
4 litigation?

5 MS. MCKEEN: I think they are, Your Honor. I think
6 that this is something that should be done in the context of
7 this proceeding.

8 THE COURT: In aid of --

9 MS. MCKEEN: I --

10 THE COURT: -- what determination? I mean, in aid of
11 a determination of a likelihood of success in showing a
12 security interest in -- because it certainly seems to me that
13 I can't do anything that would be preclusive of the argument.

14 MS. MCKEEN: I think this goes to the likelihood of
15 success issue, yes, Your Honor. I think that's right.

16 THE COURT: And so you think that I should be
17 resolving factual material, factual disputes for purposes of
18 determining a likelihood of success?

19 MS. MCKEEN: I think you can conclude that they
20 haven't made their case; that there's a likelihood of success
21 here; and that a definitive determination could always be made
22 in connection with the summary judgment proceeding. But for
23 purposes of these proceedings, they haven't met their burden.

24 THE COURT: Should this be -- if the factual issue is
25 material to a question of whether they've made a prima facie

1 case, is it something that I should consider further evidence
2 on in connection with a final hearing, or is it something you
3 think I can resolve on this record?

4 MS. MCKEEN: I think you can resolve it now, because
5 they haven't created a dispute sufficient to entitle them to
6 stay relief. The argument that they're advancing is precluded
7 by the plain text of the relevant agreement, because the
8 Assignment Agreement requires that the surplus account only
9 receive tax revenues that are in excess of the amount
10 certified by GDB as required for debt service. So they have
11 no lien over the surplus account.

12 And their proposed mapping would have their debt
13 service payments being made from the surplus account. That's
14 how you know it can't be. And because their argument is not
15 credible, there's, frankly, no need to continue to consume the
16 parties' resources and judicial resources to have a full
17 evidentiary hearing to dispense with this argument.

18 THE COURT: Thank you.

19 MS. MCKEEN: Thank you, Your Honor.

20 THE COURT: The next person up to speak is -- well,
21 for the UCC, I have Mr. Despins and Mr. Zwillinger listed as
22 speakers. And so how do you propose to allocate your time?

23 MR. DESPINS: Your Honor, good afternoon. This is
24 Luc Despins with Paul Hastings. I will cover the presentation
25 for the Committee. It's ten minutes, but I expect to be

1 shorter than that and to cede, with the Court's permission, my
2 time back to Mr. Bienenstock.

3 THE COURT: All right, then. Thank you. Please
4 begin.

5 MR. DESPINS: Okay. Thank you, Your Honor.

6 So, at the end of the day, the monolines' argument is
7 really that intent should govern here. And that's really the
8 argument that was made by Mr. Ellenberg. So they cobble
9 together some statutory provisions, a few documents here and
10 there, and say, voila, we have a security interest. But we
11 know how to grant a security interest. People know how to do
12 that. And maybe they failed to do that here because they
13 never thought that the Commonwealth would be insolvent, but
14 they just didn't.

15 And the best evidence of that are the 2015 failed
16 amendments to the statute, which are referred to in our
17 pleading at docket number 10634, where we take the Court
18 through the fact that there was a proposal to amend these
19 statutes. It would provide for a lien on gross revenues. It
20 provided for a payment mechanism directly to the trustee.
21 And, of course, that's not the landscape we have now. So they
22 really have no security interest.

23 The second point I want to address briefly, Your
24 Honor, is the *Galarza* case. It was key in that case, this is
25 on page 24 of the Court's decision, that the Secretary or the

1 Commonwealth was not in the business, in the insurance
2 business. And that was the crux of the argument, is that the
3 Commonwealth is not in the business of collecting premiums.
4 And of course, therefore, it acts merely as a custodian.

5 But here in our case, the Commonwealth is in the
6 business of collecting taxes. That's what they do for a
7 living. And therefore, the *Galarza* case really doesn't work
8 from their point of view. And also, very importantly, *Galarza*
9 is not a bankruptcy case. And that's very important. I'll
10 tie that in in a second.

11 They cite the *Howard's Appliance* case, 1989, Second
12 Circuit case. That's a case, Your Honor, that's been
13 distinguished every time it's been cited, which tells you a
14 lot.

15 And the Second Circuit itself in the *First Central*
16 *Financial* case in 2004, 377 F.3d 209, went out of its way to
17 say, well, we're not overruling *Howard's Appliance*, but,
18 quote, We need to act very cautiously to minimize conflicts
19 with the goals of the Bankruptcy Code when we're dealing with
20 constructive trusts. And also said that, we carefully note
21 the difference between constructive trust claims arising in
22 bankruptcy, as opposed to those arriving before bankruptcy.

23 And that's the tie-in to *Galarza*. That's why the
24 *Galarza* case is of very limited application, given that it's
25 not a bankruptcy case.

1 And here what we have, Your Honor, are unsecured
2 promises to do certain things. The Commonwealth obviously did
3 promise to do certain things, but that's no different than
4 what it promised to do with our constituents who built
5 buildings for the Commonwealth. They were promised to be
6 paid, paid by a date certain, et cetera, et cetera, and that
7 never happened. That's why I always refer to this bankruptcy
8 as the land of broken promises. This is one more broken
9 promise.

10 The next point I want to address, Your Honor, that's
11 very important, is that the Committee is not bound by any
12 Commonwealth pre-Title III waiver. They're not saying there
13 was a waiver, by the way, and the Board has addressed that
14 carefully in their papers. But to the extent Your Honor would
15 be inclined to find that there was a waiver, it's not binding
16 on the Committee.

17 The monolines are saying, well, of course it's
18 binding on the Committee. The Committee only has its claims
19 again, you know, through the Commonwealth, and that's true
20 when we're dealing with affirmative claims. So, for example,
21 if we want to sue a counterparty that did business with the
22 Commonwealth, we only have claims that we can assert
23 derivatively, if the Court were authorized -- were to
24 authorize such a claim.

25 But when we're dealing with defenses to a motion to

1 lift the stay, that's not the case. Any party in interest can
2 object to a motion to lift the stay. We cited the *Cheeks* case
3 for that proposition. And in that case, the Court said, well,
4 the debtor is silenced because the debtor has signed a
5 forbearance agreement leaving all their rights pre-bankruptcy,
6 but any party at interest can object. And that's why we're
7 not bound by any waiver. And we're not saying it was a
8 waiver.

9 And finally, Your Honor, the issue of Title III
10 preemption. Your Honor, they're relying on a statute that
11 says the funds shall, quote, shall be used solely for a
12 certain purpose. That statute either created a security
13 interest -- that's the argument you were making. We don't
14 think it did -- or it has to be preempted to the extent
15 they're relying on it to get some other better treatment,
16 because otherwise, they are getting a priority that's not
17 enforceable in Title III.

18 And the argument by Mr. Ellenberg that this is the
19 law, the law must be abided by, and then referring to
20 yesterday's hearing regarding PREPA, you know, I want to make
21 sure we focus on that for one second. Just -- the reason why
22 PREPA is bound to follow regulatory law is because there's a
23 section of 28 U.S.C., it's Section 959(b), that says a debtor
24 or trustee must operate their business in accordance to local
25 laws. That section doesn't mean, and therefore, you must pay

1 all the creditors you've promised to pay pursuant to statute.

2 And therefore, that's really a non sequitur.

3 And for all these reasons, Your Honor, we believe
4 that the motion should be denied.

5 So as I said, I cede the rest of my time to
6 Mr. Bienenstock. Thank you, Your Honor.

7 THE COURT: Thank you, Mr. Despins.

8 So Mr. Bienenstock, it looks like a little over four
9 minutes.

10 Ms. Selden, will you tell us what Mr. Bienenstock
11 has?

12 MS. SELDEN: About four and a half minutes, Judge.

13 THE COURT: Thank you.

14 Mr. Bienenstock.

15 MR. BIENENSTOCK: Thank you, Your Honor. Martin
16 Bienenstock of Proskauer Rose, LLP, for the Oversight Board as
17 Title III representative of the Commonwealth.

18 I'll try not to even use the full four and a half
19 minutes. I wanted to address just one issue. Your Honor
20 asked me a question as to why the term "special tax revenues"
21 is used in the definition of pledge revenues. And I gave an
22 answer, I think it was right, may be, may not be, but it was
23 en route to trying to figure out whether the final clause in
24 the definition of pledge revenues, that clause being "that
25 have been deposited to the credit of the Sinking Fund," should

1 modify only "any other monies" or should also modify "special
2 tax revenues".

3 And the reason Mr. Despins ceded me some time is
4 because I discovered over the lunch break that the Trust
5 Agreement makes it crystal clear that the final modifying
6 clause that had been deposited to the credit of the Sinking
7 Fund, has to, must, absolutely must modify special tax
8 revenues for the following reason. Special tax revenues, Your
9 Honor, are defined in the Trust Agreement to mean the offshore
10 excise taxes deposited to the credit of the Puerto Rico
11 Infrastructure Fund pursuant to the Act.

12 In turn, Section 401 of the Trust Agreement provides,
13 the Authority shall not pledge or create any liens upon any
14 monies in the Puerto Rico Infrastructure Fund. Therefore, if
15 pledged revenue is defined to mean special tax revenues,
16 without the qualifier "that have been deposited in the Sinking
17 Fund," the definition of pledged revenues would be in
18 violation of Section 401, because it would create a lien on
19 special tax revenues that are defined as deposited to the
20 credit of the Infrastructure Fund.

21 So, in order to prevent one provision of the Trust
22 Agreement from violating and being inconsistent with the
23 other, the only way to reconcile them is to say the special
24 tax revenues, as part of pledge revenues, have to have been
25 deposited to the credit of the Sinking Fund. They are no

1 longer in the Infrastructure Fund.

2 And if Your Honor interprets it that way, the Trust
3 Agreement will not violate itself, the Court will be
4 consistent with the First Circuit, and the First Circuit
5 decided that same interpretation issue consistent with the
6 Supreme Court. And that's all I wanted to say.

7 THE COURT: Thank you, Mr. Bienenstock.

8 MR. BIENENSTOCK: Thank you.

9 THE COURT: And now I will turn to Ms. Coffino for
10 Bacardi.

11 MS. COFFINO: Good afternoon, Your Honor. For the
12 record, I'm Dianne Coffino from Covington & Burling. We're
13 counsel to Bacardi International Limited and Bacardi
14 Corporation, one of the Commonwealth's rum producers.

15 I'm not going to duplicate arguments made by the
16 Oversight Board with respect to the first 117 million dollars
17 of rum excise taxes that they receive every year. I do want
18 to clarify for the record, however, that Bacardi did not
19 agree, as movants claim in their Reply Brief, that that first
20 117 million really belongs to PRIFA. All we did was defer to
21 the Oversight Board to address that issue, and we refrained
22 from duplicating those arguments.

23 I also want to respond to movants' contention, which
24 they relegate to a footnote, that the rum producers have no
25 standing to be heard. There's no question that Bacardi is a

1 party in interest in this case. It's a counterparty to
2 operative transaction agreements with the Commonwealth, and
3 it's a secured creditor that holds a perfected lien on certain
4 rum excise taxes deposited in the lockbox held by the
5 Commonwealth Treasury.

6 I'm sure we'll hear, because we've heard it before,
7 that movants don't need to lift the stay to file an action
8 against Bacardi, and in theory that's true. Bacardi's not a
9 debtor. But what they seek to do here is exercise control,
10 particularly at the Federal Treasury level, over a revenue
11 stream that belongs to the Commonwealth, and to interfere with
12 the Commonwealth contractual relationships with rum producers.
13 That requires lifting the stay or we wouldn't be here. It
14 also would interfere with our contractual rights and our
15 rights as secured creditors with perfected liens.

16 So I think we can say that safely gives the rum
17 producers standing to be heard. I'll limit the rest of my
18 argument or my comments on the arguments made by movants in
19 support of their request to lift the stay to bring claims
20 against both the Commonwealth and the rum producers for
21 allegedly conspiring to divert rum excise taxes from PRIFA to
22 the rum producers.

23 Movants make fleeting references to claims such as
24 conversion, unjust enrichment, subordination rights, but they
25 don't support these allegations in any way. In fact, to the

1 | contrary, movants repeatedly admit in their amended motion
2 | that any rum excise taxes received by the Commonwealth in
3 | excess of the first 117 million belong unequivocally to the
4 | Commonwealth, and that neither PRIFA nor PRIFA bondholders
5 | have any claim to them.

6 | The Lockbox Agreement, that document itself, which
7 | really only memorialized the parties' prior practice, makes
8 | clear that no funds flow to the rum producers until after the
9 | first 117 million is transferred from the Treasury's lockbox
10 | account to the TSA and certain other payments due other
11 | parties are made under the waterfall. These admissions alone
12 | make it impossible for movants to demonstrate a likelihood of
13 | success on the merit.

14 | Nevertheless, they argue that Section 4.6.1 of the
15 | Bacardi Agreement, which only contains an acknowledgement of
16 | the Commonwealth's retention of the first 117 million in rum
17 | taxes, creates some sort of subordination relationship with
18 | PRIFA. But this provision and the waterfall really only
19 | reflects an agreement between, again, the Commonwealth and the
20 | rum producers as to a sequence of payments.

21 | Neither PRIFA nor the trustee are parties to the
22 | Lockbox Agreement, or any other transactional documents
23 | between the rum producers and the Commonwealth. Moreover, the
24 | Lockbox Agreement makes clear in Section 24 that there are no
25 | third-party rights here; that the agreement itself doesn't

1 create any right or cause of action in or on behalf of any
2 person that is not a party to an agreement -- to the
3 agreement, and they are not, and -- as we are not parties to
4 their agreements.

5 You perfect an interest in cash by control, and that
6 is what we did to protect our interest. But neither PRIFA nor
7 PRIFA bondholders had control. They never had control. So
8 this notion of a subordination right just has no basis in fact
9 or law.

10 Finally, I just want to end by saying that the rum
11 industry is one of Puerto Rico's success stories. Even in the
12 midst of what has been a staggering series of events that have
13 created great hardship for the Commonwealth and its people,
14 the production of rum, if you just look at the Commonwealth's
15 own financials, shows that it continues to grow, generating
16 tax based revenues, increasing tax based revenues in the
17 hundreds of millions of dollars to the Commonwealth. And the
18 payments that are made to us, to the rum producers, are used
19 to promote and market that industry and the rum products.
20 Movants should not be allowed to disrupt that industry or that
21 revenue stream.

22 And unless you have questions, Your Honor, I'm done.

23 THE COURT: Thank you so much, Ms. Coffino.

24 MS. COFFINO: You're welcome.

25 THE COURT: And now we will return to movants for

1 rebuttal argument. You have 14 minutes. So who was up first
2 for movants on rebuttal?

3 MR. ELLENBERG: Sorry, Your Honor. This is Mark
4 Ellenberg. I had to get unmuted, which is a bit cumbersome.
5 Your Honor, I will take five minutes of our rebuttal time, and
6 Ms. Miller will take the balance.

7 So Your Honor, the Court identified the obvious
8 weakness in the government parties' position on excise taxes
9 in its very first question, and their position is entirely
10 circular. It assumes a question in the case, which is whether
11 we are secured, or whether HTA is the true beneficial owner of
12 the excise taxes. If HTA is the owner of the excise taxes, or
13 if we have a statutory lien against the excise taxes, then all
14 of their arguments fall apart, because they just assume that
15 we're unsecured creditors and they can do whatever they want
16 to us. That's at issue before the Court.

17 Now, you asked Mr. Bienenstock what support he had
18 for his position, and he never went to the statutes. All he
19 said was there are no words of pledging or granting of liens
20 in any of the statutes. I dispute that, but it's the wrong
21 test.

22 Bankruptcy Code Section 101(37) says that a lien is a
23 charge against or an interest in property to secure payment of
24 a debt or performance of an obligation. There are no magic
25 words specified there, and case after case have held that none

1 are required. In fact, the UCC says that anything intending
2 to be a security agreement will be deemed one. The HTA
3 Statute, we've gone through it. There's clear language there
4 suggesting that there's a charge against the property, not the
5 least of which is the phrase "covered into a special deposit
6 in the name of and for the benefit of HTA." That's pretty
7 clear.

8 And to Mr. Despins' point, as I mentioned in my
9 opening argument, the 2015 amendments actually help us,
10 because they clarify that the intent was always to transfer
11 the beneficial interest in this property to HTA. And just to
12 be clear, the transfer mandated by the statute, and it's
13 mandated, isn't what creates the property interest. It
14 reflects the fact that HTA is the proper owner from the
15 get-go; that from the moment these taxes were created to be
16 levied, they were created for the sole purpose of funding
17 these bonds. That was the essence of the deal.

18 Now, Your Honor --

19 THE COURT: May I just ask you a question?

20 MR. ELLENBERG: Sure.

21 THE COURT: As to HTA and your position that future
22 excise tax revenues, and excise tax revenues not delivered are
23 within the scope of the lien, how do you reconcile that with 9
24 LPRA section 2015, which specifically precludes recourse to
25 funds other than those pledged for the payments of such bonds

1 and interest thereon pursuant to the provisions of section
2 2004(L), which in turn provides for pledges of the proceeds of
3 any tax or other funds which may be made available to the
4 Authority by the Commonwealth?

5 MR. ELLENBERG: Your Honor, we start out with the
6 proposition that all of the excise taxes to be collected are
7 to be covered into a special account, separate from the
8 General Fund, a special deposit separate from the General
9 Fund, for the benefit of HTA. And so it's inherently a
10 forward-looking commitment.

11 And these are special revenues. This is a classic
12 municipal revenue bond deal where the bondholders look to the
13 security of a future stream of revenues pledged by the
14 municipality. And as Your Honor recognized in the last visit
15 we had before you on the subject, 928(a) is in the Code to
16 prevent 552(a) from cutting off the liens. And so, clearly,
17 we have a lien on future revenues.

18 Now, Your Honor, I'd like to speak for a minute about
19 the standard of proof.

20 THE COURT: So the "made available" language either
21 doesn't mean anything or it's made available when it's covered
22 into the special deposit?

23 MR. ELLENBERG: Yes. Exactly. But the other
24 language in the statute clearly talks prospectively about
25 future collections.

1 So, Your Honor, if I could talk for a moment about
2 standard of proof. Mr. Bienenstock greatly misrepresented the
3 standards set forth in *Grella*. And you of course can reach
4 your own conclusions on that by reading the case. We don't
5 really need to quibble much on that, because I think we meet
6 whatever standard should be imposed subject to two principles.

7 One is that the Court is ultimately not ruling on the
8 merits, but just seeing whether we have met some kind of
9 standard of viability. And second, I don't believe the Court
10 should be resolving disputed issues of fact in a plenary -- in
11 a summary proceeding like this. We need a plenary proceeding
12 with full discovery and full evidentiary rules if we're going
13 to be deciding disputed issues of fact.

14 More importantly, Your Honor, I think Mr. Bienenstock
15 also misstated what had to be proven. He said the question is
16 we have to disprove that the Commonwealth has even a
17 contingent residual interest in the assets. No. That's
18 wrong. They do, but that's just one stick from the bundle.
19 The rest of the bundle is transferred to HTA.

20 What we have to show is that we have a property
21 interest in or a charge on the rest of the bundle. Clawback,
22 again, is merely a contingent carve-out from our rights. It
23 doesn't negate the existence of the rights.

24 THE COURT: Is he correct with respect to 362(d)(2),
25 that you would have to show that the Commonwealth has no

1 equity? You would have to show a likelihood of disproving
2 even that contingent, right?

3 MR. ELLENBERG: No, not at all, Your Honor. I don't
4 think that's what that test means.

5 Obviously that's beyond the scope of this hearing.
6 That will be addressed at the final hearing. But no, I
7 completely disagree with that. And we are not trying to take
8 that contingent right away from them. We fully recognize that
9 if the circumstances permitting clawback ever occurred, and I
10 need to stress there's no evidence that they ever have or ever
11 will, but we don't deny that if they exist, clawback can be
12 invoked.

13 Again, that's the deal we signed up to. We're not
14 trying to get better rights than we signed up to. They're
15 trying to take away the rights they agreed to give us in order
16 to get us to give them five billion dollars.

17 Your Honor, if I could speak briefly about the
18 pledges at the HTA level? Well, before I get to that, Your
19 Honor, I would just like to stress that money at HTA not only
20 includes the cash they've sent down there, but that it also
21 includes Fund 278, which Ms. McKeen failed to mention includes
22 unique subaccounts that are only for HTA funds and only these
23 revenues ever went in there. And --

24 THE COURT: Mr. Ellenberg, that was your second beep,
25 so do you intend to go on?

1 MR. ELLENBERG: Yes.

2 THE COURT: Okay.

3 MR. ELLENBERG: If I could, just for a minute or two,
4 Your Honor.

5 So there are over two billion dollars credited to
6 that account right now, and those monies have been received by
7 HTA in all senses of the word.

8 Your Honor with respect to 601 and 401,
9 Mr. Bienenstock said there's no pledge in 601. Well, on its
10 face it says the funds are hereby pledged to the payment of
11 the bonds. And Section 401 says, it is only for additional
12 security. And Mr. Bienenstock is effectively reading the word
13 "additional" out of Section 401 and making Section 601
14 surplusage.

15 Finally, Your Honor, we are perfected by UCC-1
16 filings, because the receivables are pledged to us, and those
17 can be perfected by UCC-1. Moreover, the right to the
18 receivables has been pledged to us, which Mr. Bienenstock says
19 is what we need. And what he fails to look at is the
20 Supplemental Security Agreement and the Supplemental
21 Resolution 9808, both of which were adopted in connection with
22 the 1998 bonds, which make clear that the lien extends to all
23 funds required to be deposited in the Sinking Fund, not just
24 the funds that actually are deposited in the Sinking Fund.

25 Thank you, Your Honor.

1 THE COURT: I have a couple of questions for you.

2 MR. ELLENBERG: Sure, Your Honor.

3 THE COURT: Do you have evidence that there was a
4 resolution adopted with respect to the 2002 Security
5 Agreement, which I think is what you just referred to?

6 MR. ELLENBERG: Yes, Your Honor. But the -- there is
7 not a resolution, but it's also not necessary. The Board --
8 the management of HTA had authority to enter into that
9 agreement without a bond -- without a Board resolution. 9808
10 is a properly adopted Board resolution.

11 THE COURT: And turning to CCDA, you argue in your
12 papers that the grant of the relief you propose to seek in the
13 enforcement action by way of mandamus would not infringe even
14 on the Commonwealth's future contingent clawback rights. How
15 can that be, since you are looking for a mandate to push
16 through a cash flow ultimately ending at the bondholders and
17 potentially within subportions of fiscal years?

18 MR. ELLENBERG: Your Honor, if you're asking about
19 CCDA, with your permission, I'd defer that to Ms. Miller.

20 THE COURT: Okay.

21 MR. ELLENBERG: And I would just emphasize again
22 that, as to HTA, we are only seeking our right to have the
23 funds applied through the waterfall, and whatever falls out of
24 the bottom, HTA gets to use.

25 THE COURT: Thank you.

1 MR. ELLENBERG: And historically, they've had over
2 400 million dollars available to them, per year.

3 Any other questions, Your Honor?

4 THE COURT: No. That's it. Thank you.

5 MR. ELLENBERG: Thank you very much.

6 MS. MILLER: Good afternoon, Your Honor. Atara
7 Miller from Milbank on behalf of Ambac and movants.

8 Just one note, and I don't have the cite handy, but I
9 believe that there actually is a resolution approving the 2002
10 closing documents. And we'd be happy to submit that to the
11 Court, if the Court would accept it after the hearing.

12 THE COURT: Well, I would ask you to file it with an
13 informative motion, and my consideration of it will be subject
14 to any objection that the opponents may want to file in
15 response to your informative motion.

16 MS. MILLER: Understood.

17 So I'm going to jump around. And I apologize for not
18 having sort of an organized flow, but I'm going to try to
19 respond quickly to the points that were raised.

20 The first point that I would like to discuss is
21 Mr. Bienenstock stated we've never asserted a priority, so
22 that we contend, as we did earlier, that that is irrelevant
23 for now. But I want to make clear that we both have and the
24 Puerto Rico District Court has found that we do have a
25 priority, and that our priority is second only to the public

1 debt under the Puerto Rico Constitution and Puerto Rico law.
2 And that's in the *Assured versus Garcia Padilla* case, 214
3 F.Supp. 3d 117.

4 With respect to clawback, I know Mr. Ellenberg
5 touched on it briefly and noted that the Oversight Board
6 argues that we don't have -- that they have a future
7 contingent interest and therefore, it defeats our arguments.
8 That's irrelevant to the question of whether or not we have a
9 property interest.

10 The CCDA Pledge Agreement makes it most clear,
11 because it requires the money expressly in the pledge account,
12 which the Oversight Board concedes is subject to our lien, to
13 be distributed first in the circumstance when clawback is
14 triggered for the payment of the public debt. So there's no
15 question that it's a condition of our lien, but that it
16 doesn't actually affect our ownership.

17 We have ownership even though there's some
18 reversionary interest potentially. And we think that that
19 future contingent interest has not, as a matter of fact, been
20 triggered with respect to historic funds, and is unlikely,
21 particularly given our last dollars protection, to ever be
22 triggered on a go-forward basis. And, you know, to the extent
23 that the Commonwealth is contending otherwise, that would be a
24 defense to the enforcement action which the Commonwealth would
25 have to prove and which should be adjudicated there and not on

1 this motion.

2 The Oversight Board points to the impairment of the
3 GO debt in the Plan. And we heard Mr. Bienenstock refer to
4 that today as a justification for perpetual clawback, but
5 impairment of the GO debt is irrelevant to the clawback
6 analysis. Once the Proposed Plan becomes effective, and new
7 bonds are issued, and they're being paid as required on a
8 fiscal year by fiscal year basis the conditions of clawback
9 will not be triggered.

10 The Plan itself also inverts Puerto Rico law and the
11 express priority thereunder, because it assumes the payment of
12 expenses first and then the amount payable for debt service,
13 which is contrary to the order of priority set in Puerto Rico,
14 both in the Constitution and the OMB Act, which is
15 incorporated into that provision of the Constitution.

16 So the suggestion that monies will be paid to GO
17 bondholders under the Plan, already clawback money doesn't
18 save any clawback, which requires the analysis to be done on
19 an annual basis and would permit clawback only of monies
20 required in that year, which there's no proof that that's ever
21 happened.

22 I want to talk for a minute about the language in the
23 *Andalusian* decision which Mr. Bienenstock mentioned as support
24 for the applica -- or for the nonapplication of the last
25 antecedent clause principle. And I just want to -- you know,

1 the language there actually proves why it makes good sense to
2 not apply it there, and it's similarly irrational to apply or
3 to not apply the last antecedent canon in our case.

4 The definition there that was at issue was the
5 contribution paid from and after the date hereof, and that are
6 made by employers, and any assets in lieu thereof or derived
7 thereunder which are payable to the system pursuant to various
8 sections of the Enabling Act.

9 The first clause is the contributions paid from and
10 after the date hereof that are made by the employers. That
11 clause lacks specificity to the extent that if you don't have
12 the further qualifying provision, there's a certain degree of
13 vagueness and ambiguity about what that's referring to.

14 THE COURT: Ms. Miller.

15 MS. MILLER: Yes.

16 THE COURT: I'm sorry. I don't have the language
17 right in front of me, but as I recall it, it said
18 contributions made by the employers pursuant to specific
19 sections of the Act, and it was only after that that the final
20 sort of more comprehensive clause came in.

21 MS. MILLER: No. The language is cited in the
22 decision at page 464. And the full language, which I'll just
23 read it so you have the reference, it says, the resolution
24 defines employer contributions as the contributions paid from
25 and after the date hereof that are made by the employers, and

1 any assets in lieu thereof or derived thereunder which are
2 payable to the system pursuant to Sections 2-116, 3-105 and
3 4-113 of the Enabling Act.

4 THE COURT: I'm sorry. I think I was thinking of a
5 different clause. So --

6 MS. MILLER: And the question -- and the question
7 there was whether it referred to both portions of that.

8 So then we heard for the first time from
9 Mr. Bienenstock an argument that, frankly, we think is created
10 from whole cloth and we've never heard before, that PRIFA is
11 the owner of the Sinking Fund, which is just not right. I
12 mean, as this Court held in the *Assured* special revenues
13 decision at 582 B.R. 579, "a trust divides ownership of
14 property, placing legal title with the trustee while the
15 beneficiary enjoys an equitable interest."

16 And Section 405 of the Trust Agreement states that
17 the Sinking Fund "shall be held in trust for the respective
18 holders of such bonds." The suggestion, also, that it was
19 required to be held or controlled by the trustee, because
20 that's how you get perfection, is just belied by the fact that
21 Section 1907, which is on slide 21 of the PRIFA deck, provides
22 that all of the liens and pledges are automatically perfected.
23 So there would have been no reason to run through contortions
24 to get to perfection.

25 The flow of funds also clearly demonstrates it as a

1 U.S. bank account. It's reflected on slide 16, but also the
2 original flow of funds as produced to us by the government
3 parties are attached as Exhibit 36 to the Miller Declaration.
4 And when I asked Mr. Ahlberg about what it means, what the
5 yellow on the flow of funds means -- I said, and this is at
6 Exhibit 26, 342, line six, I said, okay, and what does the
7 yellow box indicate. And Mr. Ahlberg said, yellow box
8 indicates an account that is not a Commonwealth or PRIFA
9 account. There is no question that the Sinking Fund is not a
10 PRIFA account.

11 The Infrastructure Fund, I mean, Ms. McKeen just
12 totally made up what those accounts are. There's absolutely
13 no evidence. In fact, she started out by saying, well, all
14 the testimony is we have no idea what it is. It's an
15 accounting principle. And yes, so yes, the accounting matters
16 here. And that's what the infrastructure is, was, and always
17 is.

18 And the notion that Mr. Ahlberg -- of course he said
19 that it's the first -- just the first 117 million as earned,
20 because that's what everybody always thought about in the good
21 times. Well, that ignores the fact that Mr. Ahlberg had
22 nothing to do with the Commonwealth until about a year ago,
23 and that was certainly not good times when the money was just
24 flowing.

25 With respect to the Lockbox Agreement, Bacardi's

1 counsel indicated that the Lockbox Agreement only shows prior
2 practice. You know, when things were good, what were they
3 doing. And that's just wrong. The Lockbox Agreement itself,
4 as the Oversight Board points out in its brief, provides for
5 the ability to change it and to modify the flow. And they
6 just never have done that. So I think it's more than that. I
7 think it's a clear acknowledgment that certainly, at the time
8 before everything went sour, the Commonwealth fully recognized
9 its obligations here.

10 With respect to CCDA and the question about, you
11 know, what is the transfer account, and where is it, and
12 Ms. McKeen made some comments about, you know, the logical
13 inferences that we should be making, we obviously disagree
14 with the logical inferences and think that the weight of the
15 evidence supports us. In particular, this single fact that we
16 have identifying an account and tying a bank account
17 directly -- if I could just have 30 seconds to finish?

18 THE COURT: Yes.

19 MS. MILLER: Thank you. Identifies the account that
20 they say is the transfer account as the surplus account. At a
21 very, very minimum, we should get flow of funds information
22 going back to 2006, when the initial bonds were issued, and
23 then also in 2011, when they say that the Scotiabank account
24 was established, because looking at the flow of funds from
25 2015 doesn't tell me a whole lot about anything.

1 So with that, unless Your Honor has any additional
2 questions --

3 THE COURT: Let me just look at my notes for one
4 moment.

5 MS. MILLER: Actually, I had one other quick point if
6 the Court would indulge?

7 THE COURT: Yes.

8 MS. MILLER: So Your Honor asked Mr. Ellenberg about
9 the "made available" language in the HTA statute, and in my
10 mind, it's sort of corollary -- in the PRIFA statute, is
11 1906(m), which provides or defines what revenues PRIFA can
12 mortgage or pledge. And there they don't use "made available"
13 but they say "may receive".

14 And I think both of them mean the same thing, that
15 may be made available by statute, or that they may receive by
16 statute. And that has to be clear, because otherwise the very
17 last -- the very end of that, which is, "which should have
18 been transferred by Commonwealth to the Authority," doesn't
19 make sense.

20 So it's clear that the "may receive" or "made
21 available" doesn't mean actually transferred to them. It
22 means that they got through the statutory grant.

23 THE COURT: Thank you.

24 Let's see. So the Oversight Board argues that a
25 dispute over what the infrastructure is or any lien on the

1 Infrastructure Fund is ultimately irrelevant because without
2 appropriation, no money goes into the Infrastructure Fund; and
3 PRIFA wouldn't have a secured claim if the Infrastructure Fund
4 is empty.

5 Do you have a response to that, other than that it is
6 the Infrastructure Fund as soon as it hits the Commonwealth
7 essentially?

8 MS. MILLER: Well, one of my basic responses to that
9 is that the government precluded us from getting any discovery
10 into their fund accounting, and so at this point in
11 particular, I don't even know if that's a true or false
12 assertion.

13 So all I know is that the monies, based on their
14 testimony, continue to be recorded in exactly the same fund
15 and account that they were previously; and that Mr. Ahlberg
16 said that the funds are traceable through this combination of
17 fund and account numbers; that they use the same fund and
18 account numbers that they have always used; and that they
19 previously publicly disclosed those monies as being in the
20 Puerto Rico Infrastructure Fund.

21 THE COURT: Thank you, Ms. Miller.

22 I thank all of you for your arguments and for all of
23 the work that you have put into putting me in a position to
24 make a decision after this preliminary hearing that will then
25 guide us in defining whether and to what extent further

1 proceedings on the Lift Stay Motions are necessary.

2 I take these motions under submission, and will issue
3 written decisions as promptly as possible.

4 This concludes the hearing Agenda for the two-day
5 Omnibus Hearing, which included this Lift Stay Motion hearing.
6 The next scheduled hearing date is the July Omnibus Hearing
7 scheduled for July 29th to 30th of this year. I expect that
8 that hearing will occur telephonically as well, but I will
9 issue a procedures order providing appropriate logistical
10 details closer to that time, and we'll know more about how the
11 world is operating closer to that time.

12 As always, I would like to thank the Court staff in
13 Puerto Rico, in Boston, and in New York for their work in
14 preparing for and conducting this hearing, and their superb
15 ongoing support of the administration of these complex cases
16 under very challenging circumstances, including challenging
17 technological circumstances. So thank you to all of the court
18 staff.

19 Counsel, is there anything else that we need to
20 address together before we adjourn?

21 MS. MILLER: Nothing from us, Your Honor. Thank you.

22 THE COURT: Okay. I think I've waited long enough
23 for unmuting. There's two more seconds there.

24 MS. NG: Judge, are you looking for me? I'm sorry.

25 THE COURT: No. No. I'm just waiting for any

1 counsel --

2 MS. NG: Okay.

3 THE COURT: -- who might have been unmuting
4 themselves. But I think I have waited --

5 MR. BIENENSTOCK: Nothing from us either, Your
6 Honor.

7 THE COURT: Okay. Thank you, Mr. Bienenstock.

8 All right. Stay safe and keep well everyone, and
9 again, thank you. Good-bye.

10 MS. MILLER: Thank you, Your Honor.

11 MR. BIENENSTOCK: Thank you.

12 (At 3:24 PM, proceedings concluded.)

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1 U.S. DISTRICT COURT)
2 DISTRICT OF PUERTO RICO)

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4 I certify that this transcript consisting of 155 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States District Court Judge Laura Taylor Swain, and the
8 Honorable United States Magistrate Judge Judith Gail Dein on
9 June 4, 2020.

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13 S/ Amy Walker

14 Amy Walker, CSR 3799

15 Official Court Reporter

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